

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



991

JOINT APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,010

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RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 1288, *Et Al.*,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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On Petition To Review And Cross-Petition  
To Enforce An Order Of  
The National Labor Relations Board

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United States Court of Appeals  
for the District of Columbia Circuit

FILED SEP 28 1967

*Nathan J. Paulson*  
CLERK





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## INDEX

	<u>Page</u>
Prehearing Conference Stipulation, Filed July 3rd, 1967 . . . . .	1
Prehearing Order, Filed July 25, 1967 . . . . .	2
Exhibit 1(i) — Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, dated August 4, 1965 . . . . .	3
Appendix A . . . . .	9
Exhibit 1(k) — Answer, dated August 13, 1965 . . . . .	10
Excerpts from Transcript of Proceedings — September 21, 1965 . . . . .	13
<u>Witnesses:</u>	<u>Tr.</u> <u>Page</u>
Leonard W. Whitney	
Direct . . . . .	33 14
Further Direct . . . . .	64 20
Cross . . . . .	67 21
Further Cross . . . . .	107 31
C. Chase Hoffman	
Direct . . . . .	122 33
Cross . . . . .	135 38
Louise Stoebig	
Direct . . . . .	154 39
Cross . . . . .	176 45
Redirect . . . . .	200 46
Terry Van Zant	
Direct . . . . .	203 46
Otto Marston — September 22, 1965	
Direct . . . . .	222 48
Further Direct . . . . .	243 51
Cross . . . . .	246 52
Further Cross . . . . .	260 54
Redirect . . . . .	262 55
Recross . . . . .	271 56
Further Redirect . . . . .	278 57
Roland Redden, Jr.	
Direct . . . . .	283 58
Cross . . . . .	291 59
Further Cross . . . . .	294 60
Recross . . . . .	299 60
Further Recross . . . . .	300 60
Further Redirect . . . . .	311 61

## Excerpts from Transcript of Proceedings (Cont'd.)

<u>Witnesses:</u>	<u>Tr.</u> <u>Page</u>	<u>J.A.</u> <u>Page</u>
Roger Mead		
Direct . . . . .	328	63
Further Cross . . . . .	381	67
James A. Barr		
Direct . . . . .	389	68
Further Cross . . . . .	402	72
Redirect . . . . .	405	74
Claude H. Jinkerson		
Direct . . . . .	420	74
Further Cross . . . . .	470	81
Further Redirect . . . . .	479	82
Recross . . . . .	480	82
Paul Edward Bullington — September 23, 1965		
Direct . . . . .	494	84
Cross . . . . .	503	85
Further Cross . . . . .	524	87
Redirect . . . . .	526	88
Marie Roth		
Direct . . . . .	530	88
Cross . . . . .	540	89
Further Cross . . . . .	549	91
William Greaff		
Direct . . . . .	552	91
Cross . . . . .	563	94
Further Cross . . . . .	572	96
Fern Wallace		
Direct . . . . .	593	97
Cross . . . . .	603	98
Further Cross . . . . .	612	100
Redirect . . . . .	619	100
Recross . . . . .	621	101
Robert L. Campbell		
Direct . . . . .	623	101
Further Direct . . . . .	636	105
Cross . . . . .	637	105
Pauline Powell		
Direct . . . . .	654	106
Cross . . . . .	667	108

## Excerpts from Transcript of Proceedings (Cont'd.)

<u>Witnesses:</u>	<u>Tr. Page</u>	<u>J.A. Page</u>
Howard Houston — September 27, 1965		
Direct . . . . .	702	109
Cross . . . . .	706	111
Redirect . . . . .	719	112
Recross . . . . .	726	112
Further Redirect . . . . .	730	113
Pug Kilpatric		
Direct . . . . .	732	113
Cross . . . . .	740	117
James F. Alexander		
Direct . . . . .	751	117
Cross . . . . .	760	119
George Kisling		
Direct . . . . .	807	120
Cross . . . . .	815	122
Margaret Heintz		
Direct . . . . .	828	122
Cross . . . . .	838	124
Beverly Clizbe		
Direct . . . . .	852	126
Cross . . . . .	868	126
General Counsel's Exhibit No. 17 [Excerpts] — Master Food and Liquor Agreement . . . . .		128
General Counsel's Exhibit No. 18 [Excerpts] — Master Food Agreement — July 1, 1964 to June 30, 1967 . . . . .		131
Trial Examiner's Decision, dated March 11, 1966 . . . . .		132
Decision and Order, dated April 3, 1967 . . . . .		159
Appendix A — Notice to All Members of Retail Clerks International Local Union No. 1288, (AFL-CIO) . . . . .		173
Appendix B — Notice to All Members of Retail Clerks International Local Union No. 839, (AFL-CIO) . . . . .		175





## JOINT APPENDIX

### IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 1288, ET AL.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,010

#### PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the Court's approval, hereby stipulate and agree with respect to the issues and the joint appendix as follows:

#### I. STATEMENT OF THE ISSUE PRESENTED

Whether the Board erred in finding that the "demonstrator" contract provisions sought by the Unions are prohibited by Section 8(e) of the Act.

#### II. THE JOINT APPENDIX

1. The portions of the record to be printed in a joint appendix shall consist of:

a. This prehearing conference stipulation, and the Court's order in connection therewith.

b. Decision and Order of the Board, including the Trial Examiner's Decision.

c. Such portion of the typewritten transcript and the exhibits in the Board proceeding as each party shall respectively designate.

2. Each party will pay the costs of what it designates, petitioner bearing the cost of printing items (a) and (b) above. Petitioner will

serve its designation on the other parties on or before July 14, 1967. The Board will serve its designation on the other parties on or before July 19, 1967. James Mead and Roger Mead, d/b/a/ Mead's Market, if granted leave by this Court to intervene, pursuant to its motion dated June 2, 1967, will serve its designation on the parties on or before July 24, 1967. Petitioner will be responsible for the printing of the joint appendix, and will file and serve it together with its brief on or before August 9, 1967.

3. It is further agreed that any party in the briefs, and the Court at or following the hearing in the case, may refer to any portion of the original transcript of record or exhibits herein which have not been printed or otherwise reproduced, it being understood that portions of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

Dated at Washington, D.C.,  
this 3rd day of July, 1967.

/s/ Marcel Mallet-Prevost  
Assistant General Counsel  
NATIONAL LABOR RELATIONS  
BOARD

Dated at Washington, D.C.,  
this 3rd day of July, 1967

/s/ Tim L. Bornstein  
Counsel for Petitioner

[Filed July 25, 1967]

Before: Bazelon, Chief Judge, in Chambers  
PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.



Exhibit 1(i)

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 1288, AFL-CIO

and

Case No. 20-CB-1327

NICKEL'S PAY-LESS STORES OF TULARE COUNTY,  
INCORPORATED

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 1288, AFL-CIO

and

Case No. 20-CC-481

NICKEL'S PAY-LESS STORES OF TULARE COUNTY,  
INCORPORATED

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 839, AFL-CIO

and

Case No. 20-CC-489-1

JAMES MEAD AND ROGER MEAD, d/b/a  
MEAD'S MARKET

ORDER CONSOLIDATING CASES,  
CONSOLIDATED COMPLAINT AND  
NOTICE OF HEARING

It having been charged, in Cases No. 20-CB-1327 and 20-CC-481, by Nickel's Pay-Less Stores of Tulare County, Incorporated, herein called Nickel's, that Retail Clerks International Association, Local Union No. 1288, AFL-CIO, herein called Respondent 1288, and it having been further charged in Case No. 20-CC-489-1 by James Mead and Roger Mead, d/b/a Mead's Market, herein called Mead's, that Retail Clerks International Association, Local Union No. 839, AFL-CIO, herein called Respondent 839, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Acting Regional Director for the Twentieth Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act and avoid unnecessary costs and delay,

National Labor Relations Board, herein called the Board, by the undersigned Acting Regional Director for the Twentieth Region, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act and avoid unnecessary costs and delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that Cases Nos. 20-CB-1327, 20-CC-481 and 20-CC-489-1 be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Acting Regional Director, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing, and alleges as follows:

#### I

(a) A charge in Case No. 20-CB-1327 was filed by Attorney Wesley J. Fastiff, on behalf of Nickel's on January 12, 1965, and copies thereof were served on Respondent 1288 on the same date.

(b) A first-amended charge in Case No. 20-CB-1327 was filed by Attorney Ted R. Frame, on behalf of Nickel's on July 6, 1965, and copies thereof were served on Respondent 1288 on the same date.

(c) A charge in Case No. 20-CC-481 was filed by Attorney Wesley J. Fastiff on behalf of Nickel's on January 12, 1965, and copies thereof were served on Respondent 1288 on the same date.

(d) A charge in Case No. 20-CC-489-1 was filed by Attorney Ted R. Frame on behalf of Mead's on February 8, 1965, and copies thereof were served on Respondent 839 on February 9, 1965.

#### II

(a) Nickel's, a California corporation with its principal place of business at Farmersville, California, is, and at all times material herein has been, engaged in the retail sale of groceries, foodstuffs, liquors and sundries at its stores located in Tulare County, California.

(b) During the past calendar year, in the course and conduct of its business operations, Nickel's gross sales were in excess of \$500,000.

(c) During the past calendar year, in the course and conduct of its business operations, Nickel's purchased goods valued in excess of \$50,000 from suppliers located in California, which suppliers received said goods directly from points outside of California.

### III

(a) James Mead and Roger Mead, co-partners, d/b/a Mead's Market, with their principal place of business at Monterey, California, are, and at all times material herein have been, engaged in the retail sale of groceries, foodstuffs and sundries at their store located in Monterey, California.

(b) During the past calendar year, in the course and conduct of their business operations, Mead's gross sales were in excess of \$500,000.

(c) During the past calendar year, in the course and conduct of their business operations, Mead's purchased goods valued in excess of \$50,000 from suppliers located in California, which suppliers received said goods directly from points outside of California.

### IV

Nickel's and Mead's each is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and 2(7) of the Act.

### V

Respondent 1288 and Respondent 839, each is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

### VI

The following employees of Nickel's constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All retail food store employees at its stores located in the geographical jurisdiction of Respondent 1288, excluding meat department employees and supervisors as defined in the Act.

## VII

(a) On or about July 27, 1964, Nickel's recognized Respondent 1288 as the exclusive bargaining representative of all its employees in the unit described above in paragraph VI.

(b) On various dates in July, August, September and October 1964, Nickel's and Respondent 1288 engaged in negotiations with respect to a collective bargaining agreement regarding the wages, hours and working conditions of Nickel's employees in the unit described above in paragraph VI.

## VIII

Since on or about August 7, 1964, Respondent 1288 has demanded that Nickel's enter into a collective bargaining agreement containing, inter alia, certain provisions regarding the employment of demonstrators in its stores, which provisions are set forth in Appendix A attached hereto and made a part hereof, and which provisions are hereinafter described as the Demonstrator Clause.

## IX

For many years past and at all times material herein, the work of demonstrating products sold in Nickel's retail stores has been customarily performed by employees of the producers or suppliers of said products, and not by employees of Nickel's.

## X

Since on or about November 23, 1964, Respondent 1288 has been picketing Nickel's retail grocery stores, and thereby:

- (1) Induced or encouraged individuals employed by Nickel's to engage in a strike, or refusal in the course of their employment to perform any services; and
- (2) Threatened, restrained or coerced Nickel's.

## XI

An object of the conduct of Respondent 1288 set forth above in paragraphs VIII and X, is, and has been at all times material herein, to force or require Nickel's to enter into an agreement containing the

Demonstrator Clause, which clause, in view of the circumstances set forth in paragraph IX, is prohibited by Section 8(e) of the Act.

## XII

The acts of Respondent 1288 set forth above in paragraphs VIII and X, and each of said acts, for an object set forth above in paragraph XI, occurring in the circumstances set forth in paragraph IX and in connection with the operations of Nickel's described above in paragraphs II and IV, constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Sections 2(6) and 2(7) of the Act.

## XIII

The acts of Respondent 1288 set forth above in paragraph X, for an object set forth above in paragraph XI, occurring in the circumstances set forth in paragraphs VIII and IX and in connection with the operations of Nickel's described above in paragraphs II and IV, constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(A) and Sections 2(6) and 2(7) of the Act.

## XIV

Since on or about December 10, 1964, Respondent 839 has demanded that Mead's enter into a collective bargaining agreement containing, inter alia, the Demonstrator Clause, as set forth in Appendix A herein.

## XV

For many years past, and at all times material herein, the work of demonstrating products sold in Mead's retail store has been customarily performed by employees of the producers or suppliers of said products, and not by the employees of Mead's.

## XVI

Since on or about January 8, 1965, Respondent 839 has been picketing Mead's retail grocery store, and thereby:

- (1) Induced or encouraged individuals employed by Mead's to engage in a strike, or refusal in the course of their employment, to perform any services; and
- (2) Threatened, restrained or coerced Mead's.

## XVII

An object of the conduct of Respondent 839 set forth above in paragraph XVI was to force or require Mead's to enter into a contract with Respondent 839 containing the Demonstrator Clause, which clause, in view of the circumstances set forth in paragraph XV, is prohibited by Section 8(e) of the Act.

## XVIII

The acts of Respondent 839 set forth in paragraph XVI, for an object set forth in paragraph XVII, occurring in the circumstances set forth in paragraph XV and in connection with the operation of Mead's described above in paragraphs III and IV, constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(A) and Sections 2(6) and 2(7) of the Act.

PLEASE TAKE NOTICE, that on the 8th day of September, 1965, at ten o'clock in the forenoon, Pacific Daylight Saving Time, in Courtroom No. 1, Federal District Court, Post Office Building, Tulare & "M" Streets, Fresno, California, a consolidated hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Consolidated Complaint, at which time and place you will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, each Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Consolidated Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Consolidated Complaint shall be deemed to be admitted to be true as to it and may be so found by the Board.



DATED AT San Francisco, California this 4th day of August, 1965.

.....  
\_\_\_\_\_  
Natalie P. Allen  
Acting Regional Director  
National Labor Relations Board  
Twentieth Region  
450 Golden Gate Avenue, Box 36047  
San Francisco, California 94102

\_\_\_\_\_  
**APPENDIX A**

**Section 8. Classification of Employees**

(f) Demonstrators. All work connected with or incidental to the demonstration of merchandise offered for sale in the Employer's retail store (except merchandise referred to in Section 1(b) hereof as being excluded from this Agreement) shall be covered by this Agreement, and all such work shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof. No Demonstrator may perform such work in the Employer's retail store unless said Demonstrator is on the payroll of the Employer, party hereto or a licensee of said Employer, and unless the Employer at all times holds and exercises full control of the terms and conditions of employment of any such Demonstrators while such work is being performed in the Employer's retail store. Demonstrators shall be covered by all the terms of this Agreement. All employees classified as Demonstrators on April 1, 1964, shall be paid on the basis of the Regular Clerk's rate of pay.

**Section 1. Recognition and Contract Coverage**

(a) Recognition. The Employer hereby recognizes the Union as the sole collective bargaining agency for an appropriate unit consisting of all employees working in the Employer's retail food stores within the geographical jurisdiction of the Union [with exceptions not here pertinent] . . .

(b) Clerk's Work. The work covered by this Agreement shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof and such work shall consist of all work and services connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employer's retail food stores including the demonstration of such products [with exclusions not here pertinent] . . .

Exhibit 1(k)

A N S W E R

Comes now RETAIL CLERKS INTERNATIONAL ASSOCIATION, Local Union No. 1288, AFL-CIO and RETAIL CLERKS INTERNATIONAL ASSOCIATION, Local Union No. 839, AFL-CIO and they, and each of them, answering the consolidated complaint filed herein, hereby admit, deny and allege as follows:

I

In answer to the allegations contained in Paragraphs I and II, respondents admit the allegations contained therein.

II

In answer to the allegations contained in Paragraph III (a) respondents admit the allegations contained therein, except as specifically admitted, respondents have no information or belief sufficient to answer the allegations contained in subsections (b) and (c) and basing their denial on this ground, deny each and every, allegation contained therein.

III

In answer to the allegations contained in Paragraph IV respondents admit that Nickel is an employer engaged on commerce and in operations affecting commerce, but as except as specifically admitted herein, respondents have no information or belief sufficient to enable them to answer, and placing their denial on this ground deny each and every allegation contained therein.



## IV

In answer to the allegations contained in Paragraphs V and VI, respondents admit each and every allegation contained therein.

## V

In answer to the allegations contained in Paragraph VII (a), respondents allege that respondent 1288 was for many years prior to this proceeding and now is the exclusive collective bargaining representative of the Nickel employees in the unit described and respondents deny that such recognition was only accorded on or about July 27, 1964.

## VI

In answer to the allegations contained in Paragraph VII (b), respondents deny that there were any negotiations engaged in with Nickel in July, 1964.

## VII

In answer to the allegations contained in Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII, these respondents, and each of them, deny each and every, all and singular the allegations contained therein save and except that respondents admit that since on or about November 23, 1964, respondent 1288 has been picketing Nickel's retail grocery stores and that since on or about January 8, 1965, respondent 839 has been picketing Mead's retail grocery store.

WHEREFORE, respondents pray that the complaint be dismissed.  
Dated at Oakland, California, this 13th day of August, 1965.

DAVIS AND COWELL

By: \_\_\_\_\_

ROBERT P. COWELL,  
Attorneys for Respondents

-----

ROBERT P. COWELL, under penalty of perjury, desposes and says:

I am an attorney at law admitted to practice before all courts of the State of California, including the National Labor Relations Board, and am the attorney for respondents in the above entitled action; that

the facts in the above entitled action are within my personal knowledge; that respondents are unable to make the verification because their offices are maintained outside the County of Alameda, the county where declarant maintains his offices, and for that reason declarant makes this verification on behalf of respondents, and the same is true of my own knowledge except as to those matters which are therein stated upon information or belief; and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 1965, at Oakland, California.

---

ROBERT P. COWELL

-----X  
In the Matter of: :

**-and-**

**Case No.**  
**20-CB-1327**

**-and-**

**-and-**

**Case No.**  
**20-CC-481**

**-and-**

**Case No.**  
**20-CC-489-1**

**Tuesday, September 21, 1965**  
**County Courthouse,**  
**Fresno County Courthouse,**  
**Fresno, California**

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

**BEFORE:**

**LOUIS S. PENFIELD,**      **Examiner,**  
**National Labor Relations Board**

## 2 APPEARANCES:

JOHN H. ARBUCKLE,	Attorney at Law, 450 Golden Gate Avenue, Room 13440, San Francisco, California; appearing on behalf of General Counsel, National Labor Relations Board, Twentieth Region.
TED R. FRAME,	Attorney at Law, (Firm of Frame & Courtney), Post Office Box 895, Coalinga, California; appearing on behalf of Nickel's Pay-Less Stores of Tulare County, Incorporated, Charging Party; and, Mead's Market, Charging Party.
ROLAND C. DAVIS,	Attorney at Law, (Firm of Carroll, Davis, Burdick & McDonough) 351 California Street, San Francisco, California; appearing on behalf of Respondents, Locals 1288 and 839; and,
ROBERT P. COWELL,	Attorney at Law, (Firm of Carroll, Davis, Burdick & McDonough), 351 California Street, San Francisco, California; appearing on behalf of Respondents, Locals 1288 and 839..
S. J. LIPPMAN,	DeSales Building, Washington, D.C.; appearing on behalf of Retail Clerks International Association, AFL-CIO, Intervenor.

\* \* \* \* \*

33

LEONARD W. WHITNEY

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

36

Q. What is the nature of the work of the clerks in your stores?

A. They receive the merchandise in the store; they stock the shelves; they display the merchandise; and they wait on the customers at the check-stand; and, they police the stores.

Q. When you say "they display the merchandise," what do you mean by that? A. Well, they either stack it in stacks or in the case of the produce department, they put the produce on the racks.

\* \* \* \* \*

49 MR. ARBUCKLE: Well, let me say this, Mr. Examiner, I think Mr. Davis did propose a stipulation a moment ago that, if we could enter into it, it would possibly eliminate the need to carry on with the events since September 13, 1965, and I believe he stated in his proposed stipulation to the effect that he was willing to propose that from November 23, 1964 up to September 13, 1965 that one of the objects of the picketing was to obtain the demonstrator clause which we have brought into issue in this complaint.

Would you so stipulate, Mr. Davis?

\* \* \* \* \*

MR. DAVIS: I assume, Counsel, you are now referring to the picketing at Nickel's Pay-Less?

MR. ARBUCKLE: Yes, I am, to Nickel's only.

MR. DAVIS: We will so stipulate.

TRIAL EXAMINER: All right, the stipulation will be accepted.

50 \* \* \* \* \*

BY MR. ARBUCKLE:

Q. Now, has the picketing in any way affected the deliveries that are customarily made to your store by the suppliers? A. Yes, it has cut off practically all deliveries except for the beverage companies and a few independent suppliers.

\* \* \* \* \*

52 Q. Now, does it ever occur at any of your stores that free samples of goods are handed out to your customers as they are going through this store? A. Yes.

Q. For how many years has this practice been engaged in at the Nickel's Stores? A. Ever since we have been in business, twenty years.

Q. In the trade, is it - this practice frequently described or called a demonstration? A. Yes.

Q. Now, calling your attention to 1965, have there been any demonstrations in the Nickel's Stores in 1965? A. Yes.

53 Q. Do you know approximately how many? A. Well, we have had approximately - well, in the last year and a half - we have had approximately forty.

Q. In the last year and a half you have had about forty? A. Yes.

Q. All right, and during that one and one half years, have any soft drink companies given demonstrations in your stores? A. Yes, we have had several.

We have had RC Cola, Pepsi Cola, Seven-Up, Double Cola, Shasta Beverages; there have probably been some others that I can't remember.

Q. Have any milk or ice cream companies given demonstrations in your stores during this last year and one half? A. Nielson's have demonstrated milk and the Swift and Borden Companies have demonstrated ice cream.

Q. Have any meat companies demonstrated any of these products? A. Hormel has demonstrated sausages and wieners and Libby's has demonstrated Sloppy Joe Sandwiches in their canned meat division.

Q. Have any Chinese foods been demonstrated during the last year and one half? A. La Choy has demonstrated Chinese foods.

54 Q. Any other foreign foods such as Pizza or anything like that? A. Excellent Pizzas has demonstrated Pizzas.

Q. What about sugar; have the sugar companies done any demonstrating in the last year and a half? A. Well, Spreckels and C & H have demonstrated either cotton candy or given away orchids in the store.

Q. Any other food products that you can think of for which demonstrations have been given in the store during the last year and one half? A. Quaker Oats has demonstrated tortillas and pancakes.

I can't think of any others.

Q. All right.

You may have answered this question but I do not remember the answer.

Approximately how many years have demonstrations been given at your stores during the years this has been a practice? A. Ever since we have been in business, which is about twenty years.

Q. Now, has Nickel's ever had on its payroll any of the persons who have engaged in the demonstrations of the various products in your stores? A. No.

Q. Has Nickel's ever paid the wages of those persons who have engaged in demonstrations in your stores? A. No.

55 Q. When I say ever; I mean, over the twenty year period you have been in business? A. Not that I know of.

Q. To your knowledge, who has paid these demonstrators?

\* \* \* \*

A. The manufacturer or broker.

\* \* \* \*

56 BY MR. ARBUCKLE:

Q. Describe for us the nature of these demonstrations; give us a description of what happens, describe for us what a demonstration is as far as you have observed? A. Well, the demonstrator comes into the store and hands out samples and talks up the product, whatever particular product she happens to be demonstrating at the time.

Q. During what days of the week do these demonstrations take place when they do take place? A. Usually on Saturdays; sometimes, Fridays and Saturdays.

Q. Why is that? A. Well, those are usually the two days we do the most business, and the days that are most profitable for them.

Q. All right, now what hours of the day are the demonstrations usually given? A. Usually, from somewhere around 10:00 o'clock in the morning until somewhere around 6:00 o'clock in the evening.



Q. Is it your experience at Nickel's that the demonstrators are all women? A. Yes.

Q. What type of dress do they usually wear in connection with the demonstration or while they are giving their demonstration? A. Well,  
57 I don't think that they have to have any particular type of dress. Usually, they have just a white dress.

Q. What equipment do the demonstrators use in connection with their demonstrations? A. Well, it depends on what they are demonstrating.

The beverage companies usually have a dispenser that they dispense their drinks from.

Q. Who owns that dispenser? A. The beverage companies.

Q. Do they bring that with them when they come to give a demonstration? A. Yes.

Q. All right, what other equipment is used? A. For Chinese food, they use an electric skillet to prepare their food.

Q. Who furnishes that? A. The broker-salesmen.

Excellent Pizza, they have a little oven that they cook their pizzas in.

Q. Who furnishes that? A. They bring that themselves.

The sugar companies of course they have cotton candy machines that they make their cotton candy with that they have themselves. If they demonstrate orchids, they just bring the orchids with them and put  
58 them on a tray and hand them to the ladies in the store.

Q. Now, please keep your voice up, Mr. Whitney, so that everyone can hear you.

What about the milk or ice cream companies; what equipment do they use in connection with their demonstrations? A. The milk companies have a little cabinet with a tank in it that will hold ice where they can stick the milk in it, a part carton of milk while they are waiting to pour the milk out for the customers.



The ice cream companies, they usually just stand right beside the ice cream cabinet and dip it out of a package of ice cream that is open in the cabinet.

Q. Who furnishes the cups for the cones and the various equipment that is used for the milk and ice cream? A. The company who does the demonstrations.

Q. What do you furnish, if anything, to the demonstrators when they give demonstrations in your store? A. Just the merchandise to demonstrate with.

Q. You just furnish the ice cream and the milk or whatever they are demonstrating? A. Well, no, not what they use.

We buy the product and sell the product that they are demonstrating. However, we furnish nothing that they use to demonstrate with.

59 Q. You mean, if Pepsi-Cola is demonstrating Pepsi-Cola, they bring their own Pepsi-Cola, so to speak, rather than use your Pepsi-Cola? A. Well, when they demonstrate Pepsi-Cola, they use it out of the tank, it is a syrup and gas.

They do not use Pepsi-Cola out of the bottle.

Q. Is that syrup in that tank a product you have in the store?

A. No.

Q. That is not for sale at the store, is it? A. No.

Q. Now, do Nickel's select these demonstrators, that is these persons who give the demonstrations? A. No.

Q. Does Nickel's determine the amount of wages that is going to be paid to these demonstrators? A. No.

Q. Who determines what hours the demonstrators will work when the demonstrations are given in your store? A. The company that employs them.

Q. Who tells the demonstrator what to say in connection with their statements they make to customers? A. The company representative.

Q. What companies' representatives? A. The company who is doing the demonstrating.

\* \* \* \* \*

60 Q. Mr. Whitney, you have already described for us the work the clerks do in your stores.

Do the demonstrators engage in any of that same work that you customarily assign to the clerks? A. No.

MR. DAVIS: I will object and move to strike the answer.

\* \* \* \* \*

61 TRIAL EXAMINER: Well, you may put it that way.

You are asking him do they do any of things he has described, these particular employees in his grocery stores; do any of the demonstrators do the same type of work.

Is that essentially what you are asking?

MR. ARBUCKLE: Yes, Mr. Examiner.

TRIAL EXAMINER: I will permit that.

BY MR. ARBUCKLE:

Q. Can you answer the question? A. Yes, I can answer it.

No, they do not.

62 Q. Have you ever paid the wages of any demonstrator who has given a demonstration in your stores? A. No.

Q. Have you ever had a demonstrator on your payroll? A. No.

Q. Has your company ever reimbursed the supplier of the goods for the cost of the demonstrations? A. No.

\* \* \* \* \*

63 Q. Does Nickel's give any directions to the demonstrators while they are engaging in their demonstrations in your stores? A. No.

\* \* \* \* \*

64 FURTHER DIRECT EXAMINATION

BY MR. FRAME:

Q. Mr. Whitney, does Nickel's establish wages and hours or working conditions for demonstrators in its stores? A. No.

\* \* \* \* \*

65 BY MR. FRAME:

Q. Has it ever? A. No.

\* \* \* \* \*

66 MR. ARBUCKLE: Mr. Examiner, I would like to propose a stipulation at this time regarding the picket sign used during the period from November 23, 1964 up to September 13, 1965.

The picket sign said:

"PICKET, ON STRIKE, RETAIL CLERKS UNION LOCAL 1288,  
OUR CLERKS ON STRIKE FOR FAIR CONDITIONS. PLEASE DO NOT  
PATRONIZE NICKEL'S PAY-LESS, UNFAIR."

That is the end of the proposed stipulation.

MR. DAVIS: We will so stipulate.

MR. COWELL: So stipulated.

\* \* \* \* \*

67 CROSS EXAMINATION

BY MR. DAVIS:

\* \* \* \* \*

68 Q. \* \* \* What do you mean by "demonstrations"; what actually is done by a demonstrator? A. Oh, such as the beverage companies serving beverages.

Q. What do you mean by "serving beverages?" A. They have little paper cups and they give the customer a small paper cup of Pepsi-Cola or whatever brand they are serving.

Q. Do all the beverage companies operate the same way; they all serve the beverage out of a dispenser? A. All but one that I know of.

Q. What is that one? A. I think it is Mason's Root Beer, I am not sure.

(Pause.)

I am not sure on the brand.

Q. How is that handled? A. They serve that by opening bottles and pouring from the bottles.

Q. Where do they get the bottles? A. They bring them in.

Q. They do not take them off the shelves or out of the cold cases?

A. No.

Q. How is a demonstration arranged for at Nickel's Pay-Less?

69 A. The company will contact me and ask to demonstrate and ask me to usually run their item on an ad along with their demonstration.

Q. Does Nickel's Pay-Less receive any compensation for this?

A. No.

Q. Do they receive any inducements of any kind? A. Not usually, no.

Q. Who pays for the ad? A. We do.

Q. What is your incentive to have a demonstration? A. Just to have the refreshments served at the store.

Q. There is no merchandise you receive from that company that is putting on the merchandise at less than the usual cost? A. I don't think - the only one I would know of would be the beverage companies. It is not necessarily a demonstration, but any time you run an ad for a beverage company - not any time, but by previous arrangement, they will give you say, one free with five.

Q. One free what? A. One free case.

Q. This would include occasions when they have received your permission to put on a demonstration? A. That is right.

\* \* \* \* \*

70 Q. Are there suppliers who do not have any demonstrations that you deal with? A. Oh, yes.

Q. They provide you equally good deals, as you put it, to those that do put on demonstrations? A. Yes.

71 \* \* \* \* \*

Q. Then why do you have these demonstrations? A. Basically, to serve our customers with a beverage or some type of refreshments.

Q. And, on occasion, orchids? A. Right. That would be --

Q. What is that? A. That would be an extra something that they get for coming in the store.

\* \* \* \* \*

Q. Is there free coffee given out on occasion? A. On occasions, yes.

Q. Who does that? A. That is not done by demonstrators. It is done by just making a pot of coffee and letting the customers serve themselves.

Q. I see.

Who makes the coffee? A. Ourselves, sometimes, and sometimes the salesmen.

Q. When you say "ourselves," who do you mean? A. Well, either the manager or myself.

Q. Do clerks ever make that coffee? A. Not that I know of.

72 Q. Never? A. Not that I know of.

\* \* \* \* \*

76 BY MR. DAVIS:

Q. You mentioned these anniversaries, you mean your own company's anniversary? A. Yes.

Q. These suppliers will tie into your anniversary, is that it?  
A. Yes, that is right.

\* \* \* \* \*

79 Q. When you say "they help him," who do you mean by "they?"  
A. Some of the clerks.

Q. Now, other than your anniversary, do you put on particular promotional activities for a particular product or brand or anything like that during the year? A. Quite often.

\* \* \* \* \*

Q. Do you put on a special display of the merchandise in the store? A. We stack the merchandise.

Q. Who is "we"? A. The stores.

Q. Does the store manager stack the merchandise? A. No.

Q. Who does it? A. The clerks.

\* \* \* \* \*

80 Q. Now, you have testified that Swift and Borden's have demonstrators come in to give out free ice cream.

Where are these demonstrators located in the store? A. Next to the freezer.

Q. How do they get their ice cream to give away? A. Out of the cabinet.

Q. This is the cabinet from which you sell the ice cream? A. Yes.

Q. That is right? A. Right.

Q. Who puts the ice cream in there? A. The clerks.

81 \* \* \* \* \*

Q. Where is this Sloppy Joe Sandwich canned food displayed when the demonstrators are there? A. With a stack.

Q. Where the merchandise is stacked in the store, is that right? A. Yes.

Q. Who has stacked this merchandise? A. A clerk.

Q. Where is the - or, where does the demonstrator get the merchandise to demonstrate? A. She opens a can.

82 Q. From the stack? A. Yes.

Q. Now, in a case like that, Mr. Whitney, the demonstrator is using your product, is that right? A. Yes.

Q. Who pays for that? A. The salesmen.

Q. What do you mean by the "salesmen"? A. We keep the empty cans and when the salesman comes back after the demonstration is over, he writes a credit for all the cans that are used.

Q. This is the wholesale salesman that does this? A. Yes.

Q. Is this also true of the ice cream, for example? A. Yes.

\* \* \* \* \*

87 BY MR. DAVIS:

Q. Now, Mr. Whitney, you have testified that La Choy demonstrates Chinese foods in your store? A. Yes.

Q. How is this demonstration put on? A. A table was set up beside a stack of La Choy Chinese food and they would open a can and mix it up and serve it in a little paper cup.

Q. This is heated? A. Yes.

Q. How is it heated? A. In an electric skillet.

Q. I think you testified that the demonstrator brings in the electric skillet? A. Yes, and table.

Q. And the table? A. Yes.

Q. I guess you must have a plug there to plug it in? A. We locate the stack close to an electric outlet.

Q. Who pays for the electricity? A. I do; Nickel's Pay-Less does.

Q. This location is close to where the Chinese food is displayed in your store, is it not? A. Yes.

88 Q. Where does the demonstrator get the can which she opens?  
A. Off the display.

Q. The same system is followed, that the cans are counted and then you are reimbursed? A. Yes.

Q. Is that all you are reimbursed for? A. Yes.

Q. Now, you have testified that the Excellent Company, I guess it is, demonstrates pizza? A. Yes.

Q. How is this demonstration carried on? A. By baking a pizza in a small oven, an electric oven.

Q. Where is this demonstration located? A. Next to our display where the cabinets hold the pizza.

Q. Is this a cold cabinet? A. Yes.

Q. Who stocks that cabinet? A. The truck drivers who bring it in.

Q. Who replenishes it? A. He does.

They have enough on display between times and he comes back and supervises the demonstration and brings the merchandise in, he brings it in off of his truck.



89 Q. Who is "he"? What company, the Excellent Company? A.  
Yes, the Excellent Company.

Q. You mean, this product is only displayed when you are having a demonstration? A. Well, it is displayed regularly in the delicatessen case.

Q. And it is stocked entirely by the truck driver? A. Yes.

Q. Is it not re-stocked or re-arranged in any way by the clerks?  
A. No.

\* \* \* \* \*

Q. Now, the Quaker Oats Company demonstrates or sends demonstrators in, I think your testimony was, to demonstrate tortillas and pancakes, is that right? A. Yes.

90 Q. How is that demonstration carried on? A. In the case of the tortillas, they use this Masa Harina, that is the name of the tortilla flour.

Q. That is a brand of tortilla flour? A. That is a brand of tortilla flour, yes.

Q. All right, proceed. A. They take the flour and mix it into a dough and they roll out tortillas and serve with, or serve them to the customers. They cook them on an electric skillet.

Q. Where is this demonstration, that is, where does it take place in your store? A. At one of the ends next to an electric outlet.

Q. Where does the demonstrator get this flour? A. In that case, the salesman brings his own flour.

Q. Do you sell this flour in your store? A. Yes.

Q. But, the demonstrator does not take the flour from your stock? A. No.

Q. How about the pancakes? A. The pancakes are served like a breakfast.

They use a hot plate and make little pancakes and serve them on a plate with syrup.



Q. Where do they get the flour? A. The salesman brings it.

Q. Again, this is not taken from your supply? A. No.

91 Q. In both cases, the case of the Excellent Pizza preparation and the tortillas and pancakes for Quaker Oats, what is the compensation that you receive for the demonstration? A. None whatsoever.

Q. No special prices? A. No.

Q. Do you supply the power for the cooking? A. Yes.

Q. I do not remember, Mr. Whitney, whether I asked you about the pizza supply or not.

Is that brought in by the demonstrator or the salesman or is that obtained by the demonstrator from your shelves? A. It is brought in by the salesman.

Q. Only by the salesman? A. Yes.

Q. Where is your pizza kept that you sell? A. In a deli-case and then they have a portable refrigerated case that they use in some stores.

Q. Who is "they"? A. We have a case and they use it.

Q. Where does the demonstrator get the pizza? A. She gets it from the salesman.

92 Q. Not from the case? A. No, it - - - excuse me.

She gets the pizza that she cooks to serve from the salesman.

Q. And in no case, does the demonstrator take pizza from the case to demonstrate so-called; that is, to give away? A. I don't think so; if she does, the salesman replaces it if she runs out of what he leaves her.

Q. But, she may take it out of the case if she is short? A. That is possible, yes.

Q. And it is the clerks who put that in the case in the first place?  
A. It is the salesman.

Q. The salesman puts that in? A. Yes, he services off of a truck.

Q. And in all cases, no one but the salesman touches that pizza in the case? A. That is right.

Q. Now, has it ever happened, Mr. Whitney, that when a demonstrator is in the store and there is a need for more of the product to demonstrate, that either the demonstrator or the clerk goes and gets a further supply either from the shelves or from the back room? A. The clerk may go get a further supply.

Q. This does happen? A. Yes.

93 Q. What does the clerk do with it? A. He brings it out and rebuilds the stack.

Q. Where the demonstration is taking place? A. Yes.

Q. So, it is almost always the clerk who does this because it is women who do the demonstrating and they cannot carry this merchandise very easily? A. That is right.

Q. Your answer was? A. Yes, my answer was yes.

\* \* \* \* \*

94 Q. I did not ask you from what company.

I asked you from where in the store does the demonstrator get the cheese dip? A. From the same place that she gets the potato chips.

Q. Where is that? A. From the rack.

Q. Off your shelves or your rack where you are displaying merchandise for sale to the customer, is that right? A. Yes.

Q. Who puts this cheese mix on the rack? A. The salesman.

Q. You mean a driver comes in and does this? A. That this right.

Q. The clerks never touch that? A. No.

Q. These answers you have given about the salesmen doing this stocking, was this the case, Mr. Whitney, at the time you had a contract with Local 1288? A. That is right.

Q. At all times, now, that - - - A. You are speaking now of the potato chip company which is serviced off of the truck; all of their products are serviced off of the trucks and the drivers take care of all of the servicing.

95 The same way with the Excellent Pizza.

We have no extra stock except what is put on the racks.

Q. I think you gave another example besides pizza.

What other examples are there where the salesman does all of the stocking of either a rack, a shelf, or a cold case? A. Milk.

Q. What else? A. Soda water companies stock all of their racks.

Q. How about the tortillas and the pancakes and the flour? A. No, we service those.

Q. So, in any case, the demonstrator takes this cheese mix and potato chips off of the rack which is on display in your store, the display of products you have for sale to the public? A. Right.

Q. Is that right? A. Yes.

Q. How are you reimbursed for that? A. By the empty packages.

Q. And that is all? A. Yes.

Q. I think you testified that usually a demonstrator works from 10:00 a.m. to 6:00 p.m.

That is approximately eight hours.

96 Does that demonstrator have a lunch hour? A. Yes.

Q. Who establishes that lunch hour? A. The salesman that brings her in.

Q. You exercise no direction over that demonstrator as to when she shall take her lunch hour or breaks - - - A. No.

Q. - - - or any of that kind of thing? A. No, sir.

Q. Do you exercise any direction over the demonstrator as to her conduct in the store? A. Not unless she would become out of place.

Q. Then you would? A. That is right.

\* \* \* \* \*

97 Q. \* \* \*

Could you be more in detail than you were on direct examination as to what the duties of a grocery clerk are? A. To receive the merchandise; to put the merchandise on the shelves; to keep the store clean; to check the customers out when they come to the check-stands.

Q. Is building displays a part of a clerk's duties? A. That is right.

Q. Is promoting the products for sale in your store part of a clerk's duties? A. Well, yes, only not by - -

(Pause.)

Q. Not by what? A. Well, they don't talk it up or anything like that, certainly, but they promote it by stocking displays but not by personal contact.

98 Q. \* \* \*

But, suppose a customer came into the check-stand with a can of vegetables and said to the clerk, "This is a new brand to me. Is this, in your opinion, a good product and does it have a good price?"

Do you think that is part of the clerk's duties, to answer that question and try to sell the product?

\* \* \* \* \*

99 Q. Can you answer the question? A. I am sure the clerk would be able to answer that question to the satisfaction of the customer.

Q. You would expect a clerk to do so, would you not? A. Yes.

\* \* \* \* \*

101 BY MR. DAVIS:

Q. Mr. Whitney, Nickel's Pay-Less had a collective bargaining agreement with the Respondent Retail Clerks Union Local No. 1288 for the period April of 1961 to sometime in March of 1964, did it not? A. Yes.

Q. Are you familiar with that contract? A. Yes.

Q. Do you know that this contract had provision as to the wages and conditions of demonstrators? A. Yes.

Q. Did you make any effort to see that those conditions were observed when there were demonstrators in your store? A. No, they were not my employees.

\* \* \* \* \*

105 Q. Then, on the occasion when the demonstrator is not with a salesman, what does a demonstrator do when she first comes into the store? A. She comes in and sets up her - whatever she has to set up, she sets up, to do her demonstration.

106 Q. Without reporting to you or the manager? A. Yes, I will clarify that.

If she came in on, say, the first day, and there was no salesman with her, she would probably ask the manager where to set up the same as the salesman would.

Q. So, a report is made, a contact is made, between the demonstrator and/or the salesman with the management of the store before the demonstration takes place? A. As to the location, yes.

Q. This is the situation where the demonstration, the permission to demonstrate, has already been obtained? A. Yes.

\* \* \* \* \*

Q. \* \* \*

You are not interested enough to ever ask for a demonstration yourself, is that right? A. We have probably asked for an anniversary or we might ask for a soft drink demonstration.

107 Q. When you are particularly interested in the promotion of your own, a promotion of your own, it probably helps that demonstration or helps that promotion, to have a demonstration? A. That is right.

\* \* \* \* \*

#### FURTHER CROSS EXAMINATION

BY MR. LIPPMAN:

Q. Mr. Witness, in all situations where you have a demonstration, products are always sold in the store? A. Yes.

Q. Is it not one of the purposes of the demonstration to promote the sale of the particular product? A. Yes.

Q. And, at the same time, is it not true that it creates a certain amount of goodwill for the store? A. Yes.

Q. These are advantages for the store, are they not? A. Yes.

108 Q. It is also advantageous to the store that the demonstrator be a personable person and an attractive person who makes a good impression on the public, is that not so? A. Yes.

\* \* \* \* \*

113 Q. Have you ever turned down a request for a demonstration?

A. Yes.

Q. What were the reasons? A. We did not stock the product, probably.

That would be one reason we have turned down several for.

Q. What are some of the other reasons? A. It might be that we will have a conflicting date at that particular time. I might add, in the case of beverages, which is by far our largest amount of demonstrations, we may already have one scheduled for that particular day.

\* \* \* \* \*

114 Q. All right.

Is it a concern to you whether the public buys that brand or buys any other brand when you are engaging in advertising that particular brand? A. Usually, that brand is at a cut price.

If they would buy one of the other brands, we would be much happier.

Q. And, you are not promoting - - - Strike that.

You are not advertising that brand for the sake of the promotion of sales? A. We are advertising it, that particular brand to draw the people into the store.

If they buy something else, it is that much better for us.

\* \* \* \* \*

118 TRIAL EXAMINER: Now, with respect to the items that are being demonstrated, how are those advertised by you?

THE WITNESS: Usually in the same manner.

TRIAL EXAMINER: What will you say in advertising them?

Do you advertise that they will be demonstrated on a particular day; it is not a special price feature, is it?

THE WITNESS: Well, no, we do both occasionally.

In the case of Coca-Cola, we might have six bottles of coke on for forty-nine cents and we state in the ad "Free samples all day Saturday," or something like that.



119

TRIAL EXAMINER: You state that in the ad?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Usually when you have a demonstration going on, will there be a special price too on the products per item?

THE WITNESS: Not always; quite often, there is.

TRIAL EXAMINER: You said that sometimes you have more than one demonstration at a time; is that frequent or infrequent?

THE WITNESS: That is infrequent.

Usually, it occurs at anniversaries.

\* \* \* \* \*

122

### C. CHASE HOFFMAN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

125

Q. About how many demonstrations did your company put on in 1964? A. We averaged approximately ten a week-end, ten to fifteen a week-end, approximately five hundred to six hundred demonstrations for the year.

Q. Now, when you say "ten a week-end," just define for us one of those ten? What do you regard as one demonstration? A. One day in the store.

Q. So, if you sent the same demonstrator back to a store on Friday and Saturday, you would call that two demonstrations? A. That would be two days, two demonstrations, yes.

\* \* \* \* \*

Q. Approximately how much a month do you spend on the demonstrations? A. We spend approximately twelve hundred dollars to fifteen hundred dollars a month for in store demonstrations.

126 Q. Who selects the demonstrators to demonstrate your products in the various retail stores? A. Well, we have selected the majority of them ourselves.



Q. Go on. A. In this area - I should qualify that - in the Fresno area we have used the union girls. In the past few years, we have checked with the union and obtained names of girls that we have used up here.

In our area, Tulare or Kings County, where there is the majority of our business, we select our own girls there.

Q. Even in those cases where you say you select union girls, does the union select them or do you select them? A. Well, we select them; all we do is they turn the names over to us of girls who have done demonstrations and are available, and we select them from that.

Q. They give you names of available people? A. Yes, we try them out and we select the ones we want to use.

Q. Are you free to choose any one on that list that you deem or that you wish to? A. Yes.

Q. Now, when you select a demonstrator and that demonstrator - - - Strike that.

When that demonstration is given, who pays the demonstrator?

127

A. We do.

Q. Are they on your payroll? A. Yes.

Q. Who determines the wage rate that you pay them? A. Well, in our area of Tulare and Kings, we determine ourselves the wage rate.

The union girls that we have used in Fresno is determined by the union.

Q. Are you under any contract - - - when you said union, you mean the Retail Clerks? A. Yes, the Retail Clerks.

Q. Local 1288? A. Yes.

Q. Are you under any contract with Retail Clerks Local 1288 as to demonstrators? A. No.

Q. How do you know what the wages are that the Retail Clerks might require be paid these demonstrators? A. We have been informed by the girls, I guess, with the contracts that they have or copies of them.

Q. They have shown you copies of the contracts? A. I believe so, yes.

They always tell us when there is a raise involved.

Q. The girls inform you when the contract provides for a wage increase? A. Yes.

128 Q. Who assigns the demonstrators to the place of the demonstrations; that is, the store where the demonstration is to be given? A. I do or we do, our selling staff does that.

Q. Your selling staff; you have salesmen? A. We have salesmen, yes.

Q. Who determines the hours that a demonstrator works on a particular day? A. Our salesmen do.

Q. What days and hours do they customarily work, do demonstrators work? A. Well, customarily, they will be working Fridays and Saturdays.

When grand openings or something, we will work them on a Thursday.

Q. What are their normal hours? A. Well, normally, we try and work our demonstrators - well, it depends on the area.

In a farming area, our demonstrators will work until 7:00 o'clock or 8:00 o'clock at night because of some of your best business is from 4:00 o'clock to 8:00 o'clock.

In other areas, they will probably work from about 10:00 o'clock, 10:00 or 11:00 o'clock, to 6:00 o'clock or 7:00 o'clock at night.

129 Q. When you say other areas, you mean the city areas? A. The city areas, yes.

We try and hit the stores when they have maximum traffic.

Q. Are any of your demonstrators members of Retail Clerks Local 1288? A. Yes.

Q. About how many different demonstrators are you using at the present time; how many different persons do you make use of on a fairly regular basis? A. We employ from ten to twelve demonstrators all the time.

Q. All women? A. Yes.

Q. Now, when a demonstrator is demonstrating your product, please describe for us what the demonstrator does; what goes on in

that demonstration? A. Well, we set the demonstrator up in front of our milk display window or wherever the dairy products are displayed in the store.

She has sample cups and she will pour samples of milk or she dishes out small samples of cottage cheese, if we are doing cottage cheese.

She approaches, the demonstrator approaches all of the customers going by the window and she explains to them what our product is, why  
 130 our product is much better than any competitor's products and she tries to get them to pick up our brand of milk or dairy product.

Q. Who tells the demonstrator what to say to the customers who are coming in the store? A. We have a special deal that has been printed up for our demonstrators and they have - you see, they only have a few seconds to hit a customer. They have a pretty complete line of what they are to say.

You see, they only have ten or twenty seconds that you can talk before the customer is gone or else you have lost him.

Then, we have pamphlets which are printed up that we hand out to the individual customers as they go by, explaining our product.

Q. What are the qualifications that you are looking for when you hire a new demonstrator? A. Well, she would have to be pleasing to look at and friendly and a home-type looking girl easy to talk to; she has to have a good flow of language and be just kind of a pleasing girl, with a pleasing personality.

Q. What equipment do your demonstrators use in connection with their demonstrations? A. Well, we have some refrigerated equipment we put in and we have some stands that we use, some ice stands that  
 131 are set up, they are small cabinets, set up in front of the case.

We set them up to put our products in while they are demonstrating.

You have to have a place for paper cups and a waste-paper basket and places to pour milk samples out.

Q. Who furnishes this equipment, this equipment you are describing? A. We do.

We have a complete line and we have probably ten or fifteen of those units in our plant.

Q. You move them around store to store? A. We keep moving them around, yes.

Q. Has your company ever given demonstrations at any of the Nickel's Pay-Less Stores? A. Yes.

Q. Over what period of time have you given these demonstrations, for how many years? A. We have been probably demonstrating in Nickel's Stores about as long as we have been serving them, fourteen or fifteen years.

Q. During the last year, do you know or could you tell us approximately how many demonstrations you have given in the various Nickel's Stores? A. Without checking the records, I could not; I would imagine  
132 that we would hit one or two of their stores each month.

They are some of our larger stores and we have a competition problem in that store.

The only way we can solve the competition problem is by demonstrations.

\* \* \* \* \*

Q. To your knowledge, have Nickel's employees ever demonstrated your products in the Nickel's Stores? A. No.

\* \* \* \* \*

133 Q. Do you, in connection with your own work, visit the Retail Stores, your Retail customers, from time to time? A. Yes.

Q. You do generally observe the work that the clerks are engaging in at these stores? A. Yes.

Q. Do the demonstrators, while they are giving demonstrations of your products, do any work that you have observed retail clerks engaging in? A. When they are working for us on our payroll, they are demonstrating our products.

However, as far as any other work, stocking shelves or running a check-stand or something, they are not allowed to do that.

Q. They are not allowed by whom? A. By us.

Q. Now, has any retailer ever repaid your firm for the cost of the demonstration that you put on in that retailer's store? A. No.

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135

## CROSS EXAMINATION

BY MR. DAVIS:

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Q. How do you handle the financial arrangements with the grocery store for this merchandise being consumed by the customers? A. Well, the empty cartons are accumulated and, at the end of the day, the salesman when he picks up the demonstration case, will issue a credit to the store for the merchandise that we have demonstrated.

\* \* \* \* \*

142

Q. Do you give the demonstrators any kind of training other than what you have described; namely, memorizing this prepared speech? A. We work right with them on the memorized speech but then we bring them in the office and have them demonstrate milk to a few people we have there, just to give them a little experience.

Q. That is, before you send them out on a job, do you check them out, is that about it? A. Yes.

Q. This takes how long, about fifteen minutes? A. Oh, fifteen minutes or an hour.

\* \* \* \* \*

143

Q. Now, when you say "Sell" do you mean that she physically sells the merchandise to the customers? A. I shouldn't probably use "Sell"; all she does is demonstrate the qualities or - of why our product is superior to somebody else's and then the customer asks to go pick up the

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product in the case.

\* \* \* \* \*

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Q. So, the demonstrators need to know these prices?

Is that not correct? A. They would know our prices, yes.

Q. That is what I mean, your prices? A. The price is not stressed very much in dairy products because everybody has the same price of milk. There is very little confusion on that.

Our milk, what I mean to say, is the same price as everybody else's.

Q. Does this apply to all dairy products? A. Normally, only a thing like the cottage cheese might be on a special or something.

But, normally all dairy products are priced the same.

\* \* \* \* \*

151 Q. Would you say these demonstrations help you to create a continuing demand for or an increased demand for your products over that of the competitor? A. Definitely.

Q. Then, as to the customers who have been "Sold", let us say, on your products, they would return to those stores to get your products? A. Or other stores, yes.

\* \* \* \* \*

154

# LOUISE STOEBIG

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

158 Q. Now, tell us just what you do as a demonstrator? A. Well, you actually introduce the customer to the product and attempt to sell it to them.

Q. How do you attempt to sell it to them? A. In various ways, especially if it is a product they have never tried before.

You tell all of its good points and, naturally, if it is on special, you signify it is on at a special price which is usually a good selling point.

159 Q. Do you give anything to the customer? A. Yes, sir.

Q. What do you give them? A. Usually, you give them a sample of your product.

Q. Now, when you work as a demonstrator, who actually pays you? A. The company I worked for, or the company I work for, sir.

Q. Is that the supplier of the goods? A. That would be the supplier of the goods, yes, sir.



Q. And who determines the wages that you will receive? A. Well, I happen to belong to the Retail Clerks, so I naturally get the union scale.

Q. Who pays you that scale? A. The supplier or consumer who hires me.

Q. When you say "Consumer" who hires you, what do you mean? A. Well, I am sometimes hired by the salesman, I don't know how you would - - -

(Pause.)

Q. The salesman that sells the products? A. Yes, the salesman is what I meant.

That is what I was trying to say.

Q. Does he pay you in his own name or does he pay you when or does he pay you with a company check? A. Through the company, with a company check.

160 Q. Who assigns you to the store in which you are going to give the demonstration? A. Whoever contacts me for the job.

Q. Who would that be? A. Well, one of them, as I say, in Borden's. It would either be Mr. Ellis or Mr. Montague.

Q. What is Mr. Ellis' position with Borden's? A. He is supervisor of Borden's in Visalia.

Q. And what is Mr. Montague's position with Borden's? A. He is head of the plant, he is head of Borden's branch office in Visalia.

Q. Now, once you are at a store prepared to begin the demonstration, who, if you know, determines where you are going to give the demonstration in the store?

Who assigns you, in other words, who tells you where to give the demonstration? A. Well, they are set up when you go in and, of course, wherever the display is set up is usually where you go.

Q. Do you know who sets up the demonstration equipment? A. No, I would assume that the salesman would.

Q. Have you ever seen the salesman do it? A. Yes, I have seen salesmen set up and or set up a display, yes, sir.



161 Q. Those are salesmen that - - - A. That sells the products.  
Q. Salesmen for whom you are working, or for whose company  
you are working? A. Yes.

Q. What days of the week do you work customarily as a demonstrator? A. Friday and Saturday.

Q. What are your usual hours? A. 10:00 o'clock until 7:00 o'clock.

Q. I beg your pardon? A. 10:00 o'clock until 7:00 o'clock with an hour off for lunch.

Q. You take an hour for lunch? A. Yes.

Q. Who determines when you are going to take your lunch period?  
A. Well, I normally consult the manager of the store and ask when the slowest time is and I try to take it during that time.

Q. Are you obligated to him in any way to take it during that time?  
A. No, sir.

Q. You do attempt to schedule it at the slow period? A. Yes, I do attempt to do that, yes.

162 Q. Who tells you what you should say when you are demonstrating a particular product; who tells you what to say about the product?  
A. Well, I have sold for a good many years and I have felt that I have an idea of what I should say.

Q. Well, let us put it this way.

When you first started working for Borden's, who got you started and told you what would be the correct and proper thing to say about Borden's products? A. They don't tell you any specific thing to say.

Q. Do they make suggestions as to possible things to say? A. They will tell you the newest flavors and so on. If they have a new flavor that is being introduced, they will tell you.

Then, of course, if they have one particular flavor they would like you to push in preference to others, then naturally, you would mention that more often.

Q. What equipment do you use in connection with the demonstrations that you give?

MR. DAVIS: When and where; that is entirely too general a question, Mr. Arbuckle.

MR. ARBUCKLE: All right.

BY MR. ARBUCKLE:

Q. Calling your attention then to this year, you have described the fact that you have given several Borden demonstrations.

What equipment have you used in connection with your Borden demonstrations this year? A. They furnish the scoop and the cones and I usually use a TV tray and the bowl that I use for water.

163 Q. Your own personal equipment? A. My own personal things, yes.

Also, towels and any other equipment like that that I might need or use.

I use possibly a dishcloth.

Q. When you say "They" who do you mean? A. Borden's furnish me with that.

Q. Now, did you work for anybody last year other than Borden's? That is, in 1964? A. Well, I told you the Real-Gold Concentrated Juices.

Q. What equipment did you have in connection with the Real-Gold demonstration? A. I can't truthfully remember, but it was a dispenser of fruit juice which was furnished by the company.

Q. Furnished by the Real-Gold company? A. That's right.

Q. How many times have you demonstrated Real-Gold - or, how many times did you demonstrate Real-Gold? A. Once.

Q. Was there anything else in that demonstration besides a dispenser in the way of equipment? A. Cups.

Q. Who furnished you the cups? A. The company furnished the cups, the Real-Gold company.

Q. Have you ever given a demonstration at Nickel's Pay-Less Stores? A. Yes, sir.

164 Q. When was the last demonstration you gave there, approximately? A. It has been a good many years ago. It was one of their anniversary sales.

Q. Well, you say a good many years ago; can you give us a little bit better idea? A. Three or four, I would say.

Q. Three or four years ago? A. Yes.

Q. What product were you demonstrating? A. I was demonstrating Borden's Ice Cream at that time too, sir.

Q. Is that the only time you have ever demonstrated at Nickel's or were there other times prior to that? A. There were other times prior to that.

Q. How many times, if you recall, that you have worked at Nickel's in your history as a demonstrator, in any of the Nickel's stores? A. I often worked there. I work in all of them, I worked at Wood Lake and Farmersville and Exeter.

Q. Well, you have been at it now for seventeen or eighteen years. A. Fifteen or twenty times, I guess, I don't know for sure, sir.

165 Q. Fifteen or twenty times; when you say a demonstration, do you mean one day? A. That would be two days per week, Friday and Saturday.

Q. You regard Friday and Saturday as one demonstration? A. Yes, that is one demonstration, yes, sir.

Q. You have done that about fifteen times at the Nickel's stores? A. Yes.

Q. There were times when you worked at the Nickel's stores, were you ever paid by the Nickel's Company? A. No, sir.

Q. Were you ever hired to work by the Nickel's Company when you were at Nickel's? A. No, sir.

Q. Those times that you have been at the Nickel's Stores, have you observed at all what the Nickel's clerks do; observe them in carrying out their work? A. Well, I have seen them do what clerks normally do, stock shelves and - - -

Q. The question is, have you had a chance to observe; have you observed what the Nickel's clerks do, have you seen them at their work? A. Yes, I see them at their work, yes, sir.

Q. During those times you have been at Nickel's, have you done any of the same things that Nickel's clerks have done? A. No, sir.

166 MR. DAVIS: I am going to object to that question and I move that the answer be stricken.

\* \* \* \* \*

TRIAL EXAMINER: Well, she sees them work, she sees them at work.

I assume the question and if she so understands it the same way, I assume it could mean that you have observed what work they were doing while you were there?

While you were there as a demonstrator, did you engage in any of the same sort of work?

THE WITNESS: No, sir.

BY MR. ARBUCKLE:

Q. Has it ever happened that when you are giving a demonstration, there are other persons in that store also giving demonstrations? A. Yes, sir, quite often.

167 Q. Are all the demonstrators you are familiar with or acquainted with, let us say, at the times you have seen them at work, are they all women or do men do that also? A. I have only seen women.

Q. Only women? A. Yes.

\* \* \* \* \*

Q. \* \* \*

How does Borden's contact you when they want you to work for them? A. They call me.

\* \* \* \* \*

173 Q. In all your history as a demonstrator, calling attention to those occasions other than your experiences at Safeway and Purity, have you ever been paid by a Retail Store? A. No, sir.

Q. I was going to finish that by saying being paid by the Retail Store where you work, do you know? A. Other than those two occasions, no.

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176

## CROSS EXAMINATION

BY MR. DAVIS:

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Q. Then, based on this observation of yours, while you are doing this demonstrating, either standing in one spot or carrying a tray around the store, would you tell us what the job of a grocery clerk is; that is, what they do? A. As I say, my observation would be that they stock the shelves and bag groceries.

Q. What else? A. And, they check.

\* \* \* \*

183

Q. Go ahead. A. They are sweeping and cleaning up, as they do, and they are dusting the shelves.

Q. Replenishing the cold boxes? A. That is right.

Q. All right. A. They are cleaning the windows on the dairy displays and, in the produce department, they, of course, trim vegetables and keep the produce department in good order.

Q. They build displays of merchandise in the store? A. Yes, that is right.

Q. They put on prices - put prices on the merchandise in the stores? A. That is right, they mark the things.

Q. They mark the prices? A. That is right, they stamp the prices on the goods as they put them on the shelves.

Q. Have you ever seen them give out free samples? A. No, I have never seen a clerk.

\* \* \* \*

193

Q. Does it ever happen that a customer says, "I would like to have some of that ice cream", after sampling your free sample?

Do you then reach in and give the customer a quart of it, let us say? A. Certainly I do.

Q. When you are putting on a demonstration, does anybody come around to supervise your work? A. No.

\* \* \* \*

194 Q. How about breaks, do you take a break during the middle of the morning? A. Yes, and one in the afternoon.

Q. And do you ask the manager about that? A. No.

Q. And about your break in the afternoon? A. No, I just take it when I get an opportunity.

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200 REDIRECT EXAMINATION

BY MR. ARBUCKLE:

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201 Q. By the way, does the store manager direct your work at all, if any - if in any way? A. Only by designating where your display is, I assume.

202 Q. Does he designate that to you? A. No, as I say, the spot is already there when you get there.

\* \* \* \* \*

203 TERRY VAN ZANT

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

207 Q. Now, who selects <sup>3</sup> - - Strike that.

Do you select the demonstrators yourself? A. I do.

Q. And who pays those demonstrators that you select? A. My company does.

Q. Are they on the Spreckels' payroll then for the work they do demonstrating? A. They are.

Q. Who determines their wages? A. I guess you would say I do; or, more specifically, we pay union wages.

Q. Do you attempt to follow the union scale? A. Oh, yes.

Q. Is your company under contract with the union for the demonstrators? A. No.

Q. Who determines the hours that the demonstrators are going to work in a given store? A. I do.

Q. It - who determines the day of the week they will work? A. Well, I do; that would be depending on what days the store wants them for this demonstration.

\* \* \* \* \*

208 Q. Now, describe for us the nature of the demonstrations that the Spreckels' demonstrators put on; what do they do, sir? A. They make, with a cotton candy machine, cotton candy cones, these are given to youngsters in the store and to the adults if they so desire.

Q. Does the demonstrator say anything when she is giving out these candy cones? A. Yes, to the parents of the children who are in the store, she reminds them that Spreckels' sugar is on sale at whatever price it happens to be on sale at; let us say, ten pounds for  
209 ninety-seven cents for example.

She would remind them of this and if they need sugar, they could avail themselves of this.

Q. What equipment do your demonstrators use? A. The machine itself, the floss machine with its foam, and then, we also have signs for it that says, "Spreckels' Sugar" and it has clowns on it and a little bubble so that the stuff is not flying all over the store.

Q. Who furnishes that machine? A. Spreckels' Sugar Company.

Q. Has Spreckels' ever given any demonstrations at Nickel's Stores? A. I believe so.

Q. What have they given in their demonstrations at Nickel's? A. I believe cotton candy.

\* \* \* \* \*

211 Q. Now, do the demonstrators that you employ for Spreckels' engage in any of this work that you have observed clerks doing in the stores? A. No.

Q. Has it ever happened, in your experience with the company, that an employee of a retail store has demonstrated either your cotton candy or given out your orchids? A. No, sir.



212 Q. Have you ever been reimbursed by retail stores for the costs  
that your company had in performing the demonstrations? A. No, sir.

\* \* \* \* \*

219 Wednesday, September 22, 1965  
County Courthouse,  
Fresno County Courthouse,  
Fresno, California

\* \* \* \* \*

222 OTTO MARSTON

was called as a witness by and on behalf of the General Counsel, and  
having been first duly sworn, was examined and testified as follows:

# DIRECT EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

231 A. \* \* \*

As I say, we have no problem with union girls, I mean it does not  
require much instruction.

That is why I use union girls one hundred percent.

Q. All right, sir.

Now, who pays these girls after they have completed their work  
for you as a demonstrator? A. Our company, Joseph J. Morris & Asso-  
232 ciates, and then every month we bill La Choy and La Choy reim-  
burses us, they reimburse our company.

Q. La Choy reimburses your company? A. That's right.

Q. Your company, your - you are actually a food broker, are you  
not? A. Yes, that's correct.

Q. So, these are not products manufactured by your company?

A. No, sir.

Q. But, are the demonstrators on the payroll of Joseph J. Morris?

A. Yes, they are.

Q. How do you determine or, let us say, who determines the wages  
to be paid to the demonstrators? A. I have a card which I receive from  
Joan at the Clerks Union and we pay that union scale.

Q. You pay the union scale? A. Yes, that's right.

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Q. \* \* \*

Do you know whether or not they were members of the Retail Clerks Union? A. They all were with one exception.

\* \* \* \* \*

Q. All right.

Describe for us what the nature of your demonstrations are inasmuch as it has been La Choy in past years and let us just use that product as an example? A. Well, we are demonstrating a product now primarily which is called Bi-Pack, which consists of mushrooms, beef, and chicken. That is three different varieties.

These cans are taped together and the top can has either a beef gravy or a vegetable gravy or a chicken gravy.

237

That can is opened and put in an electric skillet and heated.

Q. Who is doing this work? A. The demonstrator is.

Q. All right, sir.

Please continue. A. Then, the vegetables are drained, they are in the bottom can, that can is opened and the water is drained off of the vegetables.

After your gravy is hot, the vegetables are poured into the gravy and the heating is continued - I mean, they are not boiled, because if they overheat it, it becomes mushy. They must heat it thoroughly, but not stir it too much.

Then, it is served - first, they open a can of noodles and put it in a souffle cup and it is served to the customers with the Chow Mein put over the noodles, it is served with a wooden fork.

Q. What equipment is used then to prepare this food? A. Well, we furnish the girls with an electric skillet, with a table if she does not have her own table - some of the girls furnish their own tables.

I have four tables I use if the girls do not have them.

Then, we furnish the cups, the souffle cups and the forks.

238 We furnish paper napkins, et cetera.

Q. All right.

What does the demonstrator say then to the customers as the customers are coming through the store? A. Well, she naturally gets them to sample the merchandise and tries to make a sale which is primarily the object of the demonstration.

Q. She is not actually selling and receiving money right there herself, is she? A. No, she isn't, no.

Q. And if a sale were made, it would be made at the check out stand by one of the checkers in the store? A. That would be correct.

\* \* \* \* \*

Q. Do you or have you demonstrated La Choy at Nickel's in the past? A. Yes, we have.

Q. And, at any time when you have demonstrations at Nickel's, when you have had them in the past years, has it ever occurred that the demonstration was performed by an employee of Nickel's? A. No, it

239 never has been performed by an employee of Nickel's.

Q. Now, you have described the nature of the demonstration of La Choy; is there anything else that the demonstrator does during the course of their day, during the course of their work day, other than what you have described for us already?

Is there any other work that they do in connection with their demonstration or while they are at the place of the demonstration? A. Well, they are not supposed to, but I have had as many as ten and eleven demonstrations a day or in a day, so naturally, I can't be in all the stores at the same time and I can't tell you what they do when I am not there.

Q. You say you cannot tell us what they do? A. Well, I am not there, no, I am not in all of those stores at the same time.

Not in those ten stores or those five stores or those three stores.

But, they are supposed to be primarily demonstrators. That is what we pay them for.

\* \* \* \* \*

240 Q. As far as the assignment that you give them for the work that they perform, do you assign them to do anything else at the place of the demonstration other than what you have already described? A. No, sir.

Q. Have you ever known of an occasion or has it ever come to your attention or have you ever seen an occasion where the demonstrator did work in a particular retail store such as is done by the clerks in that store; by that, I mean putting goods on shelves or checking out at the cash register or things of that nature? A. I have never seen them do it.

I had one girl at one time tell me that she had put merchandise on the shelves and I told her that she wasn't supposed to do that because, it was La Choy, and I told her she wasn't supposed to do it, that she was interfering with the clerks in the store and that she absolutely was not supposed to stock shelves.

241 Q. You had not instructed her to do that then? A. No, she did it on her own and she wasn't supposed to do it.

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Q. Have you ever heard of it happening other than that at that time? A. I have only heard once in all the years I have been setting up demonstrations.

Q. You have never heard of it happening on any except that one occasion? A. No, I have never had a report of it ever happening again.

\* \* \* \* \*

Q. All right, sir.

Has any retailer ever repaid you for the costs of the demonstration that you gave at his store? A. No, sir.

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# 243 FURTHER DIRECT EXAMINATION

BY MR. FRAME:

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244 Q. I will just rephrase my question.

When you call Joan at the union office, do you tell her that you or your company needs a demonstrator or do you tell her that the retail

store needs a demonstrator? A. I always tell her that I, I just tell her that I need three girls for La Choy and that is all; it is just that simple, I mean, I have known Joan for quite a few years.

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245 Q. Have you ever known a store manager to tell one of your demonstrators what to say or what to do in the course of her demonstration? A. No, I never have.

Q. You have testified that these demonstrators are employed by your company.

Do you check on them from time to time in the course of their work? A. Yes, I do.

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## CROSS EXAMINATION

BY MR. DAVIS:

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Q. There is a display built? A. That is correct.

Q. Who builds that display? A. It normally is built by the clerks in the store.

Q. All right, sir.

When that display is depleted by the girls in using the products to give out free samples, who replenishes that display? A. That is supposed to be replenished by the clerks in the stores.

Q. I did not ask you that, did I, Mr. Marston?

Who does replenish it? A. Well, the girls, on occasion, have been known to carry in a case of noodles from the back room.

However, I don't think they have ever been known to carry in a case of Bi-Pack, because that weighs approximately forty pounds.

250 Q. I did not ask you that either, Mr. Marston, did I? A. I am sorry, sir.

Q. I asked you who rebuilds the display that the girls take the cans from to pass out the samples? A. The clerks in the store should do that.

Q. I didn't ask you who should do it, either, did I, Mr. Marston? I asked you who does it? A. All right, the clerks in the store do, sir.

Q. Is it not a fact and do you not know that the girls, part of the job of those girls is to keep rebuilding that display from the cases that may be or may not be brought from the back room to the display area?

A. (Pause.)

Q. They do keep rebuilding that display, do they not, the demonstrators? A. I wouldn't quite agree with you on that.

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251 Q. In any of the demonstrations that you have had anything to do with or something to do with in these past many years, have you ever known demonstrators to mark prices on commodities? A. Are you referring to the displays now?

252 Q. Yes? A. It is not necessary because those are always advertised.

However, they have done so.

Q. Thank you.

In any of the demonstrations that you have had anything to do with in these past many years, have you ever known demonstrators to sell, actually sell merchandise and receive cash for it? A. No, sir.

Q. You have never known this to happen? A. No, sir.

Q. Either in any demonstrations you had anything to do with or that you knew about? A. No, sir.

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255 Q. Now, Mr. Marston, what kind of inducement, if any, do you offer to retailers for your demonstrations? A. Well, at the present time on La Choy, for the month of October, we are offering \$1.50 a case stack allowance on Bi-Pack; \$1.50 a case on two and one-half noodles.

256 Q. All right, sir, please continue. A. So, if we go into a man and offer him a demonstration, he will buy one hundred cases. Naturally, it increases our sales and he can go to work and decrease the price of our products and advertise it at a dime a can less and still come out with a larger profit than if he sold at the regular price.

By using a demonstrator, we stimulate his sales.

So, it is to his advantage, the retailer's advantage, and it is to our advantage; it is a mutual advantage.

That is why we do it.

Now, you understand, this \$1.50 is offered to people where we do not give demonstrations; it is offered to everybody on this basis.

However, we do offer the demonstration as an added incentive to increase sales.

Q. What special inducement in addition to this price that you say you offer everybody do you offer a retailer for a demonstration? A. Nothing else.

\* \* \* \* \*

259 Q. Now, how is this special price or sale communicated, the fact of the sale or the special price, communicated to the public? A. To - through advertising.

Q. By whom? A. Newspaper.

Q. Now, do you do the advertising or does La Choy do the advertising or does the grocer do the advertising? A. The grocer does the advertising.

Q. Do you compensate the grocer in any way for this advertising? A. Up until a year ago, we had a five percent advertising allowance, but that has been discontinued.

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#### FURTHER CROSS EXAMINATION

BY MR. LIPPMAN:

Q. Mr. Marston, I gather that the purpose of the demonstration is to stimulate sales? A. That is correct.

Q. And, that the demonstrator is really a saleswoman, a competent saleswoman, because her job is to sell as many products as she possibly can? A. That is correct.

\* \* \* \* \*

261

Q. Do you often receive the requests from retailers for demonstrations? A. Yes, I do, primarily for anniversaries or something like that.



Q. They find it to their advantage, do they not? A. Yes, they do.

\* \* \* \*

Q. So, would it be correct to say that you regard the demonstration as quite an asset for the retailer? A. Yes, very much so.

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# REDIRECT EXAMINATION

BY MR. ARBUCKLE:

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Q. Now, the demonstration is normally given at the point where the La Choy products are displayed, are they not? A. We try to get that, but it is not always possible.

Q. You do it if you can? A. Yes, that's correct.

Q. Would it be possible for a demonstrator in giving her demonstration to use the entire display herself in giving out samples? A. No, not giving out samples.

Q. Well, is it not a fact that she would only use a small segment of the display for the purpose of preparing the samples? A. That is correct.

Q. Have you ever observed your demonstrator building displays of La Choy products or any other products in retail stores? A. No, sir.

267

Q. Have you ever instructed your demonstrators that, in the event the display becomes, let us say, the display needs replenishing, that they should rebuild the display? A. No, they are not supposed to do so.

Q. My question is, have you ever instructed them to do so? A. No, sir.

Q. Have you ever seen any of your demonstrators marking prices on La Choy products or any other products while they are employed by you as demonstrators? A. No, I haven't.

Q. Have you ever instructed them that they should mark prices on the La Choy products or any other products they are demonstrating? A. No, I haven't.

Q. You testified earlier that you knew of an occasion when the demonstrator had marked prices on products being demonstrated; what was that occasion? A. If I recall correctly, it was a large market and the market had forgotten to advertise the item and put it on the ad, he was supposed to do that, but he had forgotten.

As I recall it, he had asked the girl to mark the prices on the cans, as I recall it, and he did reduce the price but it was not advertised.

He asked the girl to mark the price on the cans in that particular instance.

\* \* \* \* \*

268 Q. Have you instructed the demonstrators to do that type of work?

A. No, I hadn't.

Q. Do you know of any other occasion where that has happened?

A. No, I don't.

We do not instruct the girls to price merchandise because, the fact that if they did price the merchandise, it would be at the special  
269 sale price which would not agree with the price on the shelf. It would be an entirely different price and there would be no way to erase it.

Q. You can only cite that one instance that you know of? A. To the best of my knowledge.

Q. To the best of your knowledge and information? A. Yes.

\* \* \* \* \*

271 RECROSS EXAMINATION

BY MR. DAVIS:

\* \* \* \* \*

275 (The Reporter read the pending question as follows:

"Q. Would she not be a pretty good salesgirl if she saw to it that there was sufficient merchandise there of your client's so that the customers would get it when they wanted it?")

Q. Could you answer that question? A. Well, the only thing wrong with that is this; we pay the girls to be demonstrators. We do not like to have them - well, we want them right at that demonstration table all the time.

Q. I see. A. We like to have them selling, not stocking shelves, that is not their function.

\* \* \* \* \*

276 Q. Thank you, sir.

Then, would it not be - let us take another example - would it not be to your advantage for your demonstrator to ask a clerk to go into the backroom and get some more La Choy because the stock was getting low? A. That is what we have always asked our girls to do.

\* \* \* \* \*

278

# FURTHER REDIRECT EXAMINATION

BY MR. ARBUCKLE:

Q. Mr. Marston, when you make arrangements with a store manager to give a demonstration, is anything discussed in the arrangements as to the person who is going to be the demonstrator? A. With the store manager?

Q. Yes? A. No.

279

Q. Does the store manager play any role in the selection of the person who is actually going to be the demonstrator? A. No, sir.

\* \* \* \* \*

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TRIAL EXAMINER: You have mentioned the demonstrators using the product, that she would take the product from the display for use in the demonstration.

I do not believe you have testified as to who pays for that, who pays for the product that is actually used in giving out samples?

THE WITNESS: I give a check at the time, at the end of the demonstration, I go in and give them a check.

Of course, the company does reimburse it to me.

TRIAL EXAMINER: Let us be sure what we are talking about, what company we are talking about.

THE WITNESS: Joseph J. Morris & Associates.

I have an account for them, I pay the retail store from this account that I use.

TRIAL EXAMINER: Is this amount determined by the number of cases or cans or whatever it is that are used in the demonstration?

THE WITNESS: The girls save the labels and the manager of the store or someone he designates, usually the manager and myself, will  
282 go to one side and we count the labels and I pay for them on that basis.

TRIAL EXAMINER: So, you or your company pays for all that is used in connection with that demonstration?

THE WITNESS: That is correct.

\* \* \* \* \*

283 ROLAND REDDEN, JR.

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. DAVIS:

\* \* \* \* \*

287 Q. Now, on the day of the demonstration, does the demonstrator report to you? A. Yes, sir, her or Otto will.

If Otto is not with her, most of the time she will definitely come and report that she is in the store and ready to do work and where shall she be put or where is her display and when shall she start.

Q. Do you give her any instructions at that time when she reports to you? A. No, they are instructed before they come in.

\* \* \* \* \*

288 Q. Now, when the demonstrator you say has gone back to the back room to pick up more supplies, has she at some time been assisted by clerks in getting the supplies?

\* \* \* \* \*

289 THE WITNESS: Yes, sir.

BY MR. DAVIS:

Q. By whom was she assisted? A. Myself or a clerk.

Q. How is this assistance rendered? A. Well, if the case is too

heavy for her or if she cannot break it up or break it open herself, we will cut it open for her and put it on a flat top and she can wheel it out and put it up a little easier.

We carry our quick marks and we can price mark it if the price is to be put on it.

Most of the time, the price is not put on it.

\* \* \* \*

Q. Now, as store manager, do you have any power to stop a demonstration that is being conducted in the store? A. Yes, sir.

Q. What is that power? A. I can have her leave the store if I see fit to.

\* \* \* \*

291

## CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \*

292

Q. Now, is it not a fact, Mr. Redden, that it is only on rare occasion that a demonstrator in your store will actually have to go to

293

the back room and bring out goods to replenish a display? A. It is not rare, no.

Q. You mean this is a regular practice? A. Yes, sir.

Q. For what companies? A. All companies.

\* \* \* \*

294

Q. But, actually, she does not do that in the same fashion as the clerks in your store do because when they replenish, do they not customarily bring out a dollie full, four or five cases, so that they can replenish the stack in a full manner? A. Yes.

Q. Is it not a fact that on many occasions while the demonstrator is busy demonstrating the product, she will ask a clerk to bring out more product if necessary? A. Not necessarily, no.

Q. It does happen though, does it not? A. On occasion, yes.

Q. You have never actually had to ask a demonstrator to leave your store, have you? A. No, sir.

\* \* \* \* \*

FURTHER CROSS EXAMINATION

BY MR. FRAME:

\* \* \* \* \*

295 Q. During any of this time, have you ever known of a demonstrator getting paid by Mayfair? A. No, sir.

Q. Do demonstrators stock shelves, Mr. Redden? A. (Pause.)  
No, sir.

296 Q. Do demonstrators check out customers at the check stands, Mr. Redden? A. No, sir.

Q. Do demonstrators carry out merchandise from the store to the customer's automobile, Mr. Redden? A. No, sir.

Q. Mr. Redden, do you gave some testimony as to demonstrators replenishing the display, do you recall that testimony? A. Yes, sir.

Q. What displays are you referring to? A. Potato chips; La Choy; and, frankfurters.

Q. Are these displays you are referring to displays for the purpose of a demonstration? A. Yes, sir.

\* \* \* \* \*

299 RECROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

300 Q. And, you have never had your clerks devote a full day or two straight days to passing out samples of one particular part - excuse me, to one particular product, have you? A. No, sir.

\* \* \* \* \*

FURTHER RECROSS EXAMINATION

BY MR. FRAME:

\* \* \* \* \*

302 Q. All right, sir.

Do the demonstrators who come into your Mayfair store use any equipment? A. Yes, sir.

Q. Who furnishes the equipment? A. The - referring to what type of equipment?

Q. What equipment do the demonstrators use? A. A frying pan; one of our can openers; our water in the back room.

Q. Let us take a frying pan; who furnishes that? A. Mr. Marston.

303 Q. Now, in the case of the soft drink companies, are dispensers used in the demonstrations; beverage dispensers? A. Yes.

Q. Who furnishes those? A. The beverage company.

Q. Have you ever had any demonstration of pizzas in your store?  
A. Yes.

Q. Was any equipment used in connection with those demonstrations? A. A pizza cutter.

Q. Was a little oven used? A. Not necessarily; it is prepared in the back room most of the time.

Most of the time, no oven is used out in front.

Q. The oven belongs to the pizza company though, does it not?  
A. Yes, sir.

\* \* \* \* \*

311 FURTHER REDIRECT EXAMINATION

BY MR. COWELL:

Q. In the or in a normal week when there are no demonstrations going on whatever in your store, who normally stocks the shelves and replenishes the displays? A. Clerks.

\* \* \* \* \*

320 MR. ARBUCKLE: The first stipulation will read as follows:

That the parties hereby stipulate for the purpose of these proceedings as follows:

That Nickel's Pay-Less Stores and Local 1288 of the Retail Clerks International Association met on August 7, 1964; on August 20, 1964; on September 22, 1964; and, on October 2, 1964 to discuss provisions of a collective bargaining agreement;

321 That the Retail Clerks International Association, Local No. 1288, proposed Section 1 of General Counsel's Exhibit No. 17 and Section 8(g) of General Counsel's Exhibit No. 17, as they now appear in General Counsel's Exhibit No. 17, said clauses being those which are at issue in these proceedings;



That these clauses were objected to by the Employer, Nickel's Pay-Less Food Stores, and that the clauses were not withdrawn by the union during the course of these four meetings;

That these positions of the parties were the same at all four meetings as described herein before;

And, that the above-described clauses had not been withdrawn as of September 13, 1965.

That is the end of the stipulation.

TRIAL EXAMINER: Do you so stipulate?

MR. DAVIS: We so stipulate, yes, sir.

MR. FRAME: The Charging Party joins in the stipulation.

TRIAL EXAMINER: Very well.

The stipulation is received.

MR. ARBUCKLE: Mr. Examiner, I would like at this time to propose a stipulation with regard to facts concerning the Mead's aspects of the consolidated cases and it reads as follows:

That the parties hereby stipulate for the purpose of these proceedings as follows:

That Mead's Market and Local No. 839 of the Retail Clerks International Association met on December 2, 1964; on December 11, 1964; and on March 17, 1965; on March 31, 1965; and, on July 16, 1965 to discuss provisions of a collective bargaining agreement;

That the Retail Clerks International Association, Local No. 839, proposed Section 1 of General Counsel's Exhibit No. 18 and Section 14 of General Counsel's Exhibit No. 18, said clauses being those which are at issue in these proceedings;

That these clauses were objected to by the employer, Mead's Market, and that the clauses were not withdrawn by the union during the course of these five meetings;

That these positions of the parties were the same at all five meetings as described herein before; and,

That the above-described clauses have not been withdrawn by said Local No. 839.

That is the end of the stipulation.

TRIAL EXAMINER: Do you so stipulate, Mr. Davis?

MR. DAVIS: May we have just a moment, Your Honor?

TRIAL EXAMINER: Certainly, you may.

MR. DAVIS: We so stipulate reserving all issues in our Answer, particularly with respect to commerce.

TRIAL EXAMINER: Very well.

MR. FRAME: Charging Party agrees to the stipulation.

TRIAL EXAMINER: Very well.

The stipulation is received in evidence.

\* \* \* \* \*

326 MR. ARBUCKLE: Mr. Examiner, I propose the following stipulation:

327 That the picketing at Mead's Market began on or about December 30, 1964; and,

That one of the union's objects in initiating the picketing on December 30, 1964, was to obtain a collective bargaining agreement containing, among other things, the demonstrator clauses in issue and specifically as setforth in General Counsel's Exhibit No. 18 Section 1 and Section 14.

We so propose such stipulation.

MR. DAVIS: We so stipulate.

TRIAL EXAMINER: Do you join in the stipulation, Mr. Frame?

MR. FRAME: I join in the stipulation, sir.

TRIAL EXAMINER: Very well.

The stipulation is received.

\* \* \* \* \*

# ROGER MEAD

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

## 328 DIRECT EXAMINATION

\* \* \* \* \*

333 BY MR. ARBUCKLE:

Q. I will ask you, Mr. Mead, do you select the demonstrators, that is, does Mead's Market select the demonstrators? A. No.

Q. Have you ever selected the demonstrators? A. No.

334 Q. Does Mead's Market pay the demonstrators, pay the wages of the demonstrators? A. No.

Q. Have you ever paid the wages of a demonstrator? A. No, sir.

Q. Has it ever happened in the history of your relationship with Mead's Market that your clerks have put on demonstrations of various products sold in your store? A. No.

\* \* \* \* \*

335 Q. Well, I don't really mean that.

I mean, once the demonstrator is there and is about to begin, after all the arrangements have been made, what does the demonstrator do?

A. The demonstrator, if the display - if her table has been brought in already, she just goes over to the table and opens up whatever she is giving away and starts in.

Q. What does she do or say in connection with giving the samples?

A. You mean, to the customers or to me?

Q. To the customers? A. Well, she tells them how good the product is and asks them if they would like to sample it.

Q. What is the dress that the demonstrator wears? A. Pretty much a street dress.

Q. What color, is there any particular color which they wear?

A. No, just whatever they might happen to wear.

Q. I see.

What about the equipment which is used or is there any equipment used in connection with the demonstrations in your store? A. Yes, sir.

336 Q. What is that equipment? A. Well, when the Diet Rite Cola people, which is Royal Crown in that area, they distribute the Diet Rite Cola, they have a little folding bar that they bring along and paper cups and a bottle opener.

Usually, they have a tub full of ice to keep the soda in to keep it cold.

Q. What other equipment do - is used on other demonstrations?

A. We have an ice cream demonstration and they - or, we had an ice cream demonstration and they brought a little container and they had dry ice in it to keep the ice cream hard.

Then, they had their dipper and they had cones and they had napkins.

Then, Spreckels' Sugar, they had some kind of machine that they poured sugar in and brought out cotton candy.

Q. Did they provide that? A. Yes, sir.

Q. What, if anything, do you provide to the demonstrators? A. Space; a little electricity; and, a box one time for one of them to sit on.

Q. Do you determine the wages of the demonstrator? A. No.

Q. Do you give the demonstrator any type of directions or instructions? A. No.

Q. Who determines the place where the demonstration will be given in the store? A. The supplier.

Q. Do you have anything to say about that at all? A. No, when they ask for a demonstration, I am pleased to have them and I tell them to have it any place they like and they always pick right in front of the check stand and that is where all the customers come, but that is fine with me.

Q. Do you tell the demonstrators what to say in connection with their demonstration? A. No.

Q. Do you ever assign a demonstrator or demonstrators the work of stocking the shelves in the store? A. No.

Q. Do the demonstrators ever work at the cash register checking out customers? A. No.

Q. Do demonstrators ever carry merchandise to the cars of customers? A. No.

338 Q. Do demonstrators ever clean up, that is, sweep up the store or dust the merchandise or anything of that nature? A. No - - - Well, if they make a mess when they are demonstrating, if they spill something and nobody is handy, they will clean that up and they clean up their own empty cups and take them with them when they leave.

Q. What days of the week do these demonstrations normally occur?

A. The short demonstrations occur practically any day of the week, but the all-day demonstrations usually are on Friday or Saturday.

Q. Has it ever happened that your company has paid the wages of a demonstrator for demonstrating in your store? A. No.

Q. Has a demonstrator ever been on your payroll? A. No.

Q. Does your company reimburse the supplier for the cost of a demonstration that is given in your store? A. No.

Q. If the demonstrator is demonstrating a particular product and the supply near the point of the demonstration or let us say the supply in the store is low, who replaces that supply so there will be sufficient product there for your customers?

339

A. We do.

Q. Who do you mean by "We?" A. Myself or anybody passing by. We tell the demonstrator if there is anything that they need - - -

Q. Do you mean by "Anybody," do you mean any customer? A. No, mostly somebody working for us, one of the clerks.

Q. So it is you or one of the clerks that replenishes the stock? A. Yes, sir.

Q. Who customarily initiates the suggestion for the demonstrations; your company or the suppliers? A. I didn't quite hear the first part of that.

Q. I said, who customarily initiates the suggestion for the demonstrations; who makes the suggestion that a demonstration be given.

Is that something you suggest to the supplier or do they bring it up to you? A. They bring it up to us unless it is like on the anniversary sales, then we put out the word we are going to have an anniversary sale and if anybody could put on a demonstration, we would like to work them into our anniversary sale.

Q. But, you only make the request in connection with your anniversary sale? A. Yes, sir.

340 Q. Is it correct to say that during the majority of the times, it is the suppliers who make the requests of you? A. Yes, sir.

Q. Do the clerks in your store have anything to do with preparing the advertising in the store; that is, your signs and things of that nature?

A. My brother makes up the grocery ads for the newspaper and I make up the produce ads.

Q. Do demonstrators ever do that type of work? A. No.

Q. Have any of the demonstrators who have ever come into your store to demonstrate ever been later employed by you as clerks? A. Well, not that I can think of.

Q. Have any of your clerks that have worked for you in past history, have they ever come into your store as a demonstrator?

That is, to demonstrate a particular product? A. No.

\* \* \* \* \*

381

#### FURTHER CROSS-EXAMINATION

BY MR. LIPPMAN:

Q. Mr. Mead, do you think that demonstrations are good for your business? A. Yes, sir.

Q. Do they stimulate your business? A. Yes, sir.

Q. Do they create additional demands for your products, for your products that you sell? A. All products, yes, sir.

\* \* \* \* \*

384

Q. Do you not during the week build special types of displays with special attraction to the customers which attracts the customers by to that particular display? A. Yes, sir.

\* \* \* \* \*

Q. Who builds those displays? A. In the case of groceries, my brother builds most of them and in the case of produce, either myself or one of the clerks build them.

The same with the groceries, my brother will do it or he will get one of the clerks to put up a stack of groceries.

\* \* \* \* \*



385 Q. When these demonstrators are at work, do they not urge the customers to buy the product if they are giving out the samples; is that not the purpose, in a very polite and very diplomatic way? A. Yes.

\* \* \* \* \*

389 JAMES A. BARR

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

# DIRECT EXAMINATION

BY MR. ARBUCELE:

\* \* \* \* \*

Q. By whom are you employed Mr. Barr? A. Foremost Dairies.

Q. In what capacity? A. Branch manager of Monterey.

\* \* \* \* \*

390 Q. Do you supply your dairy products to Nickel's - I am sorry - to Mead's Market? A. Yes.

\* \* \* \* \*

391 Q. Does your company engage in any demonstrations? A. Yes, from time to time.

Q. Where do you perform these demonstrations? A. At various markets within the area I cover.

Q. Have you engaged in some demonstrations during the past twenty months since you have been manager? A. Yes.

Q. Prior to that, when you were a salesman in the Salinas area, did you or your company engage in demonstrations in the area where you were selling? A. Yes.

\* \* \* \* \*

392 Q. And, let me ask you this.

Who selects the person that does the demonstrating when you do decide to have a demonstration? A. I have a demonstrator I prefer to use.

Q. Do you select that person then? A. Yes.

Q. Who pays that person's - first, is it a man or woman? A.

It is a woman.



Q. Who pays that woman? A. The company does.

Q. Your company? A. Yes.

Q. Who determines the wages that you pay that woman? A. We pay union scale.

Q. Do you have a contract with the Retail Clerks Union covering the demonstrators? A. No.

Q. Do you have a contract with any union covering the demonstrators? A. Not to my knowledge.

393 Q. Who informs the demonstrators as to the place or the store in which she will give the demonstration? A. I do.

Q. Who determines the hours that a demonstrator will work? A. I do.

Q. What days and hours do your demonstrators customarily work? A. As a rule, Friday or Saturday; Friday, or Friday and Saturday.

Q. What hours on those days? A. Usually, from 10:00 o'clock to 5:00 o'clock or 10:00 o'clock to 5:30.

Q. Just what is the nature of a demonstration that is given by one of your demonstrators; what do they do? A. It is either sampling to the consumers or shoppers in the store of one of the products from our line.

Q. How do they go about it; what does the demonstrator do in that regard? A. Well, if it is a fluid milk product, why they sample the consumer into a paper cup from one of our packages.

If it is an ice cream product, usually a sampling size cone is used.

Q. The demonstrator prepares the sample and gives it to the customer?

394 A. Yes.

Q. Is anything said in connection with giving of the sample?

A. Usually, the demonstrator of course will ask the person if they would care for a sample.

Depending on the product that is being sampled, some of the merits are attempted to be put across to the customer about the particular product.

Q. So, who tells the demonstrator what to say in connection with the demonstration? A. Well, we have a make-up of our various products that provides the demonstrator with information about a product.

Q. What do you mean by a "Make-up?" A. Well, in other words, calorie content, butterfat and milk solids, if it be a product that - with added solids to it.

Ice cream, again the flavoring, the butterfat, and some of the ingredients that go into the ice cream.

Q. Do you have some kind of a booklet or sheet that you give the demonstrator containing this information? A. We have a looseleaf booklet that is prepared. We also have some pamphlet type information that is used from time to time by the demonstrator and these pamphlets are also passed on to the consumer.

Q. What qualifications do you look for in selecting a demonstrator?

395 A. Well, I look for someone that is going to do the kind of job that I want them to do.

Q. Well, what qualifications or qualities does that person have to have in order to do that job? A. Well, I look for someone that has a pleasing personality; that can present the product in a satisfactory manner to build goodwill and good public relations for the company and for the store that she is working in.

Q. What equipment do you use in connection with your demonstrations? A. On fluid products, the paper cups.

For cottage cheese or sour cream products, either potato chips or a cracker or something like that.

With ice cream we use the ice cream cones.

Q. Who furnishes those materials? A. We do.

Q. Do you reimburse the retail store in any way for the products, for the milk or ice cream or cottage cheese used in connection with the demonstration? A. Yes, we replace the merchandise.

Q. Has your company ever given a demonstration that has - well, have you ever given a demonstration at Mead's Market? A. Yes.

Q. Can you remember when the last one was?

396 A. December of last year.

Q. 1964? A. Yes.

Q. What did you demonstrate on that occasion? A. Eggnog.

Q. Have you demonstrated any other products at Mead's prior to that demonstration? A. Not to my knowledge.

Q. Who was the - - - Strike that.

Was that your regular demonstrator that you used to give that demonstration at Mead's? A. Yes, sir.

Q. How long has that particular woman been working for you as a demonstrator? A. Oh, about five years.

Q. She has been working for the company for about five years?

A. She has not worked for us directly; she has been employed by us if we have had occasion to use or need her.

Q. She is not a regular full-time employee? A. No.

Q. Do you use her in any other capacity besides as a demonstrator? A. No.

Q.

\* \* \* \* \*

397 Do you assign your demonstrators to do any shelving of groceries goods during the time they are giving a demonstration? A. No.

Q. Do you know whether or not they do that? A. I don't know.

Q. Have you ever heard that they did? A. No.

Q. Do your demonstrators ever work at the cashier's checkout stand? That is, in their spare time while they are demonstrating? A. Not to my knowledge.

Q. You have never heard of that? A. No.

Q. Do your demonstrators ever carry goods out to the cars for customers? A. Not that I know of.

Q. Have your demonstrators ever marked the prices on goods while they have been demonstrating? A. They could on occasion mark the price of the product that they are demonstrating.

Q. Have they ever been known to mark the price on foods - on the goods? A. Well, - - -

Q. That is, on goods or products other than Foremost products?

398

A. No.

Q. Do the store managers ever tell your demonstrators what to say in connection with their demonstrations? A. They could.

Q. Has it happened to your knowledge? A. Not to my knowledge, no.

Q. Has any retail firm ever reimbursed your company for the cost in giving the demonstrations? A. No.

Q. How do you normally make contact with this one woman who does your demonstrating for you whenever you want her to do a job for you? A. I call her and check on her schedule.

Q. Do you tell her where to go? A. Yes.

Q. If she is available or you ask her if she is available? A. Yes.

Q. Who makes the arrangements with the retail store to enable you to give the demonstration? A. I do.

Q. And, who determines where the demonstration will be given in a particular store? A. Well, I would say the product.

399

The space available near where the product is normally stocked determines the space for the location.

Q. Do you confer with the store manager on that subject? A. Yes.

Q. Who brings in the equipment for the demonstrator to get her started on the beginning of her day? A. Well, it depends on the equipment involved.

If it requires an additional display or merchandise type cabinet, why it is delivered by us and stocked by us prior to the demonstration.

\* \* \* \* \*

402

#### FURTHER CROSS-EXAMINATION

BY MR. LIPPMAN:

Q. You have observed, have you not, Mr. Witness, that demonstrations increase the volume of sales of your products in the store involved, increase your sales on the day of the demonstrations? A. Well, that is what we hope they do.

403 Q. That is the purpose? A. Right.

Q. And, you say a good demonstrator is also a good sales person? A. Yes, I would say that.

However, I don't measure the success of a demonstration from the results on the day that the demonstration is done.

\* \* \* \* \*

BY MR. LIPPMAN:

Q. I am sorry, go ahead. A. Our primary concern in a demonstration is to acquaint people with our product and leave the consumer with a good impression.

Q. And, a desire to buy the product? A. Yes, that is right.

Q. All right, sir. A. Now, if we have to force this product into a consumer's basket, something that she does not particularly want, we are not doing a job of public relations with this consumer.

So, this is why I say that I would rather have the woman walk into the store six weeks later and remember that person who presented this product to her or introduced her to the product has left a favorable  
404 impression on her, than to walk past it and say, "I don't like the product because I don't like the person that was involved in the demonstration."

Q. Do you look - or, you do look not only to the increased sales on that day, but you look at it from a longer point of view? A. That's right.

Q. And, the person coming into the store would naturally prefer your brand over the other brands? A. Yes, that's right.

Q. Do you, in connection with your demonstrations normally make arrangements for a sales program with the store on that particular day? A. We like to have the product advertised in their weekly ad to tie into the demonstration.

Q. And they make an announcement that there will also be a demonstration of the product? A. Right.

Q. Do you find that demonstrations are good for the store? A. I think so, yes, sir.

\* \* \* \* \*

405

## REDIRECT EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \*

Q. Have you ever known an occasion where a clerk in a retail store did the demonstration for you, for your company, rather than you bringing in an outside person to do the demonstrating? A. No.

\* \* \* \*

420

CLAUDE H. JINKERSON

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. DAVIS:

Q. Will you state your name, please? A. Claude H. Jinkerson.

\* \* \* \*

Q. What is your occupation, Mr. Jinkerson? A. I am secretary of the Retail Clerks Union, Local No. 648.

\* \* \* \*

Q. That is a local union of the Retail Clerks International Association? A. That is correct.

\* \* \* \*

423

Q. Now, let me - - - I will withdraw that.

Mr. Jinkerson, describe for the record for our benefit what the job of a grocery clerk was at the time that you were an active grocery clerk?

\* \* \* \*

436

MR. FRAME: Now, is this in a service store or in a self service store and was it prior to 1937?

MR. DAVIS: Either or both and yes, it was prior to 1937.

BY MR. DAVIS:

Q. Can you answer the question? A. In a service store, clerks usually busy themselves putting away milk and bread and produce; and, displaying it so it would be attractive to the customers coming in, starting about 10:00 in the morning.



The checkers would make their check stands clean and presentable and the merchandise that they were to suggest to the customers, as additional sales items, would be displayed on the counter or near the counter.

Other clerks would be busy stocking or restocking shelves from the previous day's business and still others would be in the back room cleaning up and breaking down cases for the stocking of the front shelves in the stores.

\* \* \* \* \*

- 437 Q. What about displaying of merchandise; what function did a grocery clerk have in displaying the merchandise for sale in the store? A. The grocery clerk displayed the merchandise on the end of islands and in between aisles on what we call a special display basis for the purpose of trying to increase sales, items that he wanted to push, and he would have additional stock for items that would be on sale which would be displayed.

They call these stacks of special displays.

We could have our normal displays of certain items that would be near the check stand such as candy, potato chips, and things of that kind.

\* \* \* \* \*

- 438 Q. Now, there has been a good deal of discussion about free samples here.

What is your experience again restricting you to the period that you were a grocery clerk and an owner and a manager prior to 1937; what was your experience during that period as to the giving out of free samples during that period? A. It was one of the duties of a clerk to push the merchandise that was being introduced for the first time by any firm or by merchandise that they felt would bring them a better profit margin.

We would assign our checkers at the check stands to do suggestive selling and in most of the stores in which I worked, we would reward them for their efforts.



Q. How did you do that? A. By extra bonuses, smal bonuses, and keep account of the amount of items that they sold and we would run contests between stores.

Q. How was the actual giving out of free samples done; describe that process and give us the examples? A. Well, in the case of Kraft Cheese, we were permitted by the Kraft Cheese Company to take packages and cut them up in little cubes, cut the cheese up in little cubes, and fix them with toothpicks and offer them to the customers when they came on in the store for the purpose of having them sample and try the cheese  
439 and also to follow up and ask them if they would like to buy some of this new product, this cheese.

In the case of Kraft, we were permitted to cut open the package, sample it to the customer, and do suggestive selling to them and returning to the wholesaler the empty package for reimbursement.

Q. In each of these examples you have cited, the grocery clerk in the store would do this at the request of the supplier or at the suggestion of the supplier, is that correct, such as Kraft or Nabisco or whatever it might be? A. From both the request of the supplier and at the request of management, both were encouraging these endeavors along this line.

Quite frequently, the store manager would have the right to try to increase his sales of Kraft Cheese or Nabisco Crackers without consulting higher management.

But, on house brands and other things that management wanted to push, they would instruct us to display these items near the check stand or on the check stand and to get behind them and get some movement on them, get some sales.

\* \* \* \* \*

440 Q. Now, at that time you were an owner of a grocery store, did you have any dealings with suppliers in connection with the use of demonstrators?

\* \* \* \* \*

THE WITNESS: I was a store owner in the years 1931 and 1932.

\* \* \* \* \*

441 THE WITNESS: I was more interested in getting advertising allowances and discount allowances and display allowances than getting a demonstrator, believe me.

BY MR. DAVIS:

Q. What do you mean by that? A. Well, it is common practice in grocery stores for grocery operators to get support and help from suppliers.

This is offered in the form of advertising allowances, it is offered in the form of display allowances; and, it is offered in the form of sometimes helping with the pay roll of individuals.

\* \* \* \* \*

MR. FRAME: I move that this testimony be stricken unless it is identified as to when and where this allegedly occurred.

BY MR. DAVIS:

Q. Mr. Jinkerson, can you tell us when and where; you have told us where; tell us when this occurred at the Crystal Palace in San Francisco? A. It was during the pre World War II, that the Crystal Palace mark it in the years of 1938, 1939 and in 1940.

\* \* \* \* \*

444 Q. In connection with those displays allowances, it has sometimes happened that you or your clerks - or when you were working in a store as a clerk - would put on some kind of a free sample program?

\* \* \* \* \*

A. Well, all grocers and myself in particular, we would advertise as committed and we would build displays as committed, we would push the item.

Q. How would you push the item? A. By telling the customers that this is something that they should try; that they hadn't tried it, to try it. We would do suggestive selling and instruct the clerks to do suggestive selling of the item.

\* \* \* \* \*

445 Q. As I understand from what you said earlier, when you were running a grocery store; that is, when you were the owner of the grocery store, you did not use outside demonstrators; is that right? A. No, in fact in 1931 and 1932, I don't think there was any one employed as a demonstrator that I can recall.

Q. You do not recall any such line of work so-called for somebody who did just demonstrating? A. Demonstrating and sampling was carried out by the store operator and a clerk in promoting the sales in the store.

The demonstrator came along after the Depression and I believe the demonstrator was there before the Depression.

This is an extra show that the merchant was willing to put on and they expected to be reimbursed, however, by the supplier.

446 Q. In other words, the demonstration that occurred during the Depression and prior to World War II was almost entirely done by the grocery operator within the store, not by some outside person? A. No, that is my testimony, that is all I observed.

\* \* \* \* \*

449 Q. Now, when these demonstrators who are directly employed by the suppliers became members of your union, what if anything did you do about establishing conditions for them; wages, hours and working conditions? A. We negotiated with the retail grocery industry, the Retail Grocers Association in San Francisco, we negotiated for the rates of pay and the conditions to be the same as clerks, because they were clerks, their work was the same as clerks.

\* \* \* \* \*

Q. Did the Retail Grocers Association do anything about it advising its members about what conditions should apply for the demonstrators? A. Yes, they helped in enforcing the contract as to the Clerks' Work Provision and also other conditions of the contract.

On occasion, they have advised their members not to have outsiders work in the stores and those who were permitted to work would  
450 be demonstrators but they must be guaranteed the conditions of a clerk.

\* \* \* \* \*

451 Q. There has been some discussion by other witnesses as to the extent of supervision of demonstrators when they are in a retail store.

Based upon your experience and background, both as clerk, and owner, and a manager, as well as executive secretary of your union, what can you tell us about the extent of supervision, if any, of demonstrators who come in on behalf of suppliers in retail grocery stores? A. The supervision of the demonstrator's activity during the time that she is in  
452 the store is controlled by the manager of the store or his assistant.

Generally speaking, they do receive visits from the company representatives of the products they are demonstrating or displaying and selling, but those visits are maybe once or twice during the time of the demonstration.

If it is a two-day demonstration he, maybe, would go see the demonstrator twice. If it is one-day demonstration, the demonstrator might see him once.

All the rest of the time they are under the supervision of the market operator or store manager.

\* \* \* \* \*

456 Q. Does your dispatcher in such a case endeavor to make any contact with the grocery store operator who is going to have this demonstration or where the demonstration is going to be held? A. Yes, all of our contacts are with the operator.

Q. In other words, as I understand it, you - I mean, the supplier may call or the grocer may call but in the case where the supplier calls, there is discussion concerning where this demonstration is going to be and when? A. The supplier calls on occasion when he has an advertising campaign he is initiating and he has been out seeing if he can get spots  
457 where he can get his advertising or demonstration underway.

He calls and finds out what our rules and regulations are. We in turn give him information but make it clear to him that this person, if they are working a firm under contract, that they are actually working for that firm and we do not care what his relationship is or what his reimbursement factor is.

Q. Very well. A. They must get the union scale and we would look to the operator for that.

Q. The retail operator? A. Yes.

Q. You tell the supplier this? A. Oh, yes.

\* \* \* \* \*

458 Q. To your knowledge, are there any demonstrators on this list who have indicated to you or other representatives of the Union, within your knowledge, that they would like to secure a job as a grocery clerk?  
A. Yes.

Q. Have you on occasion in the past secured retail grocery clerk jobs working directly for a retail grocer or operator, a job for them as a demonstrator? A. Yes, we have.

\* \* \* \* \*

462 Q. \* \* \*

Now, I will ask you if in that Section there is anything, any change from the previous contract which you had defining clerks' work? A. Not in any basic principle. It is identical to what we have had since 1955 in  
463 language and it is identical to the practice we have had since I have been in office in 1938.

Previously, we set out jurisdiction; we did not spell it out before 1955 this way.

\* \* \* \* \*

Q. Now, there is added to that in General Counsel's Exhibit No. 12 (a) the clause including the demonstration of such products.

What was the purpose of that addition as the result of your committee deliberations? A. (Examining documents.)

My interpretation was to bring a clarification to the contract that had been attempted during the life of the previous contract in handling demonstrators.

\* \* \* \* \*

464 We had always looked to the operator as the person who was responsible for the conditions of the demonstrator in their employment as a demonstrator; he controlled all of these factors.

We wanted to make it clear that this problem had been brought to our attention during the life of the other contract as a problem and one which needed correction.

This is the purpose of including it in Section 1.

Q. Did the food operators who were members of that committee raise any question about the inclusion of that language? A. They did not.

Q. Why has it always been your position as you testified that the food operator must be held responsible for the wages and conditions of employment of the demonstrator? A. The employment of the demonstrator at the start was on the basis that the operator didn't have anyone available, he couldn't carry on the thing himself and he said, "If you can get me a demonstrator, you go ahead and do it."

But quite frequently this work was assigned to people in the store and, if we didn't keep this relationship, this would be allowing a person to come in and take our work someone who was not covered by the contract.

465 We had to make the employer responsible because we were giving him permission to use an outsider to do the same work that our people were doing.

\* \* \* \* \*

470 FURTHER CROSS-EXAMINATION

\* \* \* \* \*

476 TRIAL EXAMINER: You have no knowledge then of whatever arrangements for compensation are made between the supplier of the demonstrator and the store owner, is that right?

THE WITNESS: We don't try to get into that because merchants are different in effectiveness in negotiations.

Some don't get the same amount as others.

477 What we are interested in is people who work there, whether they are clerks or demonstrators, we want them to get a rate of pay.

TRIAL EXAMINER: So far as any reimbursement or compensation or arrangements that may be made between the supplier and the store owner, that is of no concern to you?



THE WITNESS: Well, we will offer a service to him if he wants it. We have said to them that the problem with them is that of guaranteeing the wages and hours.

We have told them we would send them a slip, send a slip along with them to the supplier stating what they would have to get as to total compensation from that supplier.

TRIAL EXAMINER: That is your only connection?

THE WITNESS: Just so long as he guarantees and knows his obligation under the contract, yes.

\* \* \* \* \*

479

#### FURTHER REDIRECT EXAMINATION

BY MR. LIPPMAN:

Q. In other words, Mr. Jinkerson, the arrangements which the market operator might make with the supplier is his business. So far as the union is concerned, it looks to the market operator to guarantee the condition in the contract? A. Yes, that is correct.

Q. If there is a grievance, if the demonstrator claims she has not been paid her regular rate or has not been given her hours, who do you go to? A. We go to the market operator.

Q. You have had experiences of that sort? A. Yes.

\* \* \* \* \*

It is a matter of going to the market operator for any infractions, anything concerning this person's work.

Q. Did I also understand you to say that even though your language approach in the contract has changed, in terms of actual practice, it has been the same throughout the years? A. Yes, that is correct.

\* \* \* \* \*

480

#### RECROSS EXAMINATION

BY MR. ARBUCKLE:

Q. Is it not a fact, that under this clause, there are a good many instances where the suppliers actually pay the wages of the demonstrator rather than the retail store operator? A. I think that there may be occasions when this happens, I don't know.



I can't say that is a fact.

I am assuming that this is a fact because we have them ask questions as to our rates of pay; they are either paying them directly or reimbursing the merchant.

I get into the thing when I talk to them and - or, when I talk to them in terms of their conditions and rates of pay when they ask me to collect unpaid wages.

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492

Thursday, September 23, 1965  
County Courthouse,  
Fresno County,  
Fresno, California

494

PAUL EDWARD BULLINGTON

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COWELL:

496

Q. Now, directing our attention to the delicatessen department,

497

I believe you said that they or that you have demonstrated cheeses in the delicatessen department, is that right? A. Yes.

Q. How is this demonstration put on? A. Well, the one that Kraft had for me, they hired a demonstrator, I think it was on Danish Samsøe Swiss.

The girl cut the little cubes of cheese and put toothpicks in it and handed them to the customers.

Q. All right, sir.

You say that Kraft supplied this.

Was this one of your clerks doing it or was it some outside person?

A. It was a demonstrator.

Q. Now, approximately when was this Kraft demonstration? A. That was approximately two years ago; that was the last one I had on cheese.

Q. By Kraft, you mean? A. Yes.

Q. Subsequent to the Kraft demonstration, have you yourself demonstrated cheeses? A. I have cut cubes and we set the cheese out on the floor and set the cubes with toothpicks out there for customers to taste and, if any customer comes in and wants to taste the cheese, I give them a sample.

498 Q. Do the clerks also follow the same procedure that you follow  
in giving samples to the customers? A. (Nodding affirmatively.)

\* \* \* \*

500 Q. Now, when the demonstration has been arranged, as you have  
told us in your conversation between yourself and this salesman, what  
takes place on the day of the demonstration? A. Well, the demonstra-  
tor comes in and sets up her stand if it is a wiener, she will set up her  
skillet.

Q. Well, does she report to you? A. Yes.

Q. Do you then give her any instructions as to where she is to  
place her skillet? A. I tell her where to put it and I show her where  
her items are that she is going to demonstrate.

I also show her where the - well, if she is demonstrating wieners,  
I will show her in the back where the wieners are.

501 Q. Why do you show her in the back where wieners are, Mr.  
Bullington? A. Because, if I am out to lunch or gone, I leave at  
4:30 and she is there usually until 7:00 o'clock and she goes back and  
fills up the case.

Q. Fills what case up? A. The wiener case if she is demonstra-  
ting wieners, her product.

\* \* \* \*

Q. Does the demonstrator mark prices on them? A. She does if  
I am not there.

Q. You have seen demonstrators pricemark merchandise? A.  
Mine have.

\* \* \* \*

503 CROSS EXAMINATION

\* \* \* \*

509 BY MR. ARBUCKLE:

Q. Four times you have demonstrated cheese? A. Yes.

Q. For how long a period; is that something you would do for a  
full day doing that alone? A. Usually, on weekends.

Q. Yes, but I mean do you do it on a regular full-time basis for a weekend so that you will be there -- A. I said that I set the cheese, the cubes on trays with toothpicks in them.

Q. I see. A. So that they can taste it.

Q. So that people can pick it up as they come by then; is that right; it is not necessary for you to spend all of your time there with the samples? A. No, that is correct.

Q. So, you are able to continue your regular duties while this type of a demonstration is going on? A. Yes, that is right.

\* \* \* \* \*

510 Q. Does it ever happen that -- at your store -- that one of your clerks will devote an entire day doing nothing else but demonstrating, that is, giving away samples of a particular product? A. The store clerks?

Q. Yes, one of the store clerks? A. No.

\* \* \* \* \*

511 Q. All right, sir.

Then, it was not necessary, however, on those occasions for someone, for a clerk that is, to stand there during the entire two days to pass out the potato chips, was it? A. No.

Q. No. So, all that was done was from time to time the clerks would go back to that spot and be sure there was a supply in the bowl for customers to take their samples from, is that right? A. Yes, sir.

Q. So, during those demonstrations, the clerks are able to continue with their customary work with the additional responsibility of looking after the potato chip bowl? A. Yes.

\* \* \* \* \*

520 Q. Do you ever have outside demonstrators coming in in connection with your delicatessen products? A. Yes.

\* \* \* \* \*

521

Q. \*\*\*

It is the supplier of the product that makes the arrangements to hire demonstrators; that is correct, is it not? A. Yes, the supplier that is going to furnish the product.

Q. Yes, sir. They make the arrangements to get a girl to come in? A. Through the union, yes.

Q. All right, sir. That demonstrator that comes in to your delicatessen department to give the demonstration, she is paid by the supplier of the goods that she demonstrates? A. Yes, sir.

Q. She is not on your payroll, is she; that is, the payroll of Mayfair?

\* \* \* \* \*

A. (Pause.) I don't think so.

\* \* \* \* \*

524

## FURTHER CROSS EXAMINATION

BY MR. FRAME:

Q. Mr. Bullington, do most of the outside demonstrators you see wear white dresses or white smocks of some kind? A. Some do.

Q. Is it not true that most of them wear white dresses? A. Handling food, white dresses look better.

Q. Do the outside demonstrators who come into your store stock shelves? A. Are you talking about in my department?

Q. Well, generally, do the outside demonstrators who come into the store stock shelves? A. Demonstrators I know handle their product that they are demonstrating.

\* \* \* \* \*

Q. Do they stock any other products? A. No, not that I know of.

Q. Do they work at the check stands? A. No.

525

Q. Do they carry out groceries from the check stands to the customer's cars? A. No.

\* \* \* \* \*

526 Q. Do you tell the outside demonstrator what to say in the course of their demonstrations? A. I tell them the price of the product.

Q. Do you tell them what to say? A. The demonstrators have probably been working for the company and they know their product so I don't tell them what to say.

\* \* \* \* \*

# REDIRECT EXAMINATION

BY MR. COWELL:

\* \* \* \* \*

527 Q. Now, take one of these items that your prepared foods clerks demonstrate such as sour cream ambrosia that I believe you testified to, how does a clerk demonstrate that? A. We have little cups with plastic spoons, these little candy cups I think they are.

We make everything right there at the store and they will tell the customers what it is made of and let them taste it and tell them what goes into it.

Q. They will tell them how it is made? A. Yes.

\* \* \* \* \*

528 Q. So, your clerks are available all day to demonstrate this sour cream ambrosia, is that right? A. Yes, sir.

Q. On the days that you are demonstrating this product? A. When we demonstrate, yes.

\* \* \* \* \*

530

MARIE ROTH

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

# DIRECT EXAMINATION

BY MR. LIPPMAN:

\* \* \* \* \*

533 Q. In other words, you were extolling the virtues and the qualities of the bread and the meat product that you were selling? A. That is right.

Q. But, in connection with that, you were actually selling the product? A. That's right.

Q. How much did you receive? A. Ten cents per sandwich.

Q. Did you actually receive the money? A. I did.

Q. To whom did you turn over the money? A. At the end of the day, I would turn it over to the manager that was on the floor.

\* \* \* \* \*

534

Q.\*\*\*

Now, while working there, under whose supervision did you work?

A. Under the manager.

Q. The store manager, is that who you refer to as the manager?

A. That's right.

Q. Did he assign lunch hours to you? A. Yes, he did, we asked him when it was convenient or when there was not too many people; he knew his customers and he knew the time that we were to go out to lunch.

Q. If you had any problem during the day, with whom would you take up your problem? A. With the manager.

Q. Would the manager come around and observe you at work from time to time? A. Yes, he would, to see how we were selling and how we were getting along.

Q. What type of dress did you wear? A. White uniforms.

535

Q. What type of uniforms did the other clerks wear, do you know?

A. Their regular work clothes.

\* \* \* \* \*

540

## CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

541

Q. Have you ever demonstrated at Nickel's Stores, Nickel's Pay-Less Stores, either in Farmersville, Woodlake, Tulare or Exeter?

A. No, I haven't.



Q. Have you ever demonstrated in any of those four towns in any stores in any of those four towns? A. No, sir.

\* \* \* \* \*

542 Q. Now, you have never demonstrated at Mead's Market in Monterey, California, have you? A. No.

Q. Have you ever demonstrated in Monterey at all, in the Monterey Area? A. No.

\* \* \* \* \*

544 Q. Who paid you when you sold sandwiches at Safeway? A. I took -- well, I got my check through Safeway.

Q. Who paid you when you sold at Ritze? A. The meat department, Mr. Ritze paid me.

545 Q. Now, when you demonstrated products like Coca-Cola, Seven-Up and Challenge Milk, on those occasions, who -- you were paid by the Coca-Cola or Seven-Up or the Challenge Company, were you not? A. That's right.

Q. And, it was their salesmen who made contact with you? A. That's right.

Q. And it was their salesmen who indicated what they would like to have you say in regard to demonstrating the product? A. That's right.

Q. And it was their salesmen who told you what days they would like you to work? A. That's right.

Q. And, would their salesmen normally meet you at the particular store at the beginning of the first day of a demonstration? A. That's right.

Q. They would help you get set up? A. That's right.

Q. And, they would be sure that there was a good point -- excuse me, I meant to say, they would be sure that there was a good quantity of the merchandise available that you were demonstrating? A. That's right.

546 Q. They would also indicate to you where in the store a demonstration was going to be given? A. That is right.

Q. They would also indicate to you the hours to work, the hours they wanted you to work in that demonstration? A. That is right.

\* \* \* \*

547 Q. It was not necessary for you to go to the manager every time you needed a new supply, was it? A. No.

Q. So, it really was not very much that the manager had to do with supervising you on those occasions, was it; you knew what to do? A. Yes, I knew what to do.

\* \* \* \*

#### 549 FURTHER CROSS EXAMINATION

\* \* \* \*

BY MR. FRAME:

551 Q. Mrs. Roth, do these store managers tell you what to say about the product you are demonstrating? A. No, they don't.

Q. Mrs. Roth, when you say that you sell products you are demonstrating, do you mean sell in the same sense that you sold the hot dogs and the ham sandwiches or in some other sense? A. Well, I think that is entirely different, your ham sandwiches and your hot dogs.

When you are out demonstrating a product like say wieners, you are giving the customers a sample and naturally if they like it, they will buy it.

\* \* \* \*

#### 552 WILLIAM GREAFF

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. COWELL:

Q. State your name and address for the record, please? A. William Greaff, 4894 East San Gabriel, Fresno, California.

Q. What position do you hold, Mr. Greaff? A. I am manager of Giant No. 10, at Blackstone and Barstow.

Q. That is the Giant Food King? A. Right.

Q. That is in the City of Fresno? A. Yes, sir.

\* \* \* \*

558 Q. Do you have any control over the conduct of the demonstrator while she is in the store? A. Yes, the same as a regular clerk.

If the girl is a capable girl, she needs very little supervision. If we find she is tending to wander all over the store and into the back room and is not pushing the product, then we have a talk with them.

\* \* \* \*

559 Q. You also mentioned I believe that you and the clerks themselves have demonstrated, I think, what you have referred to as check stand demonstrations? A. Right.

Q. Would you explain what you mean by that? A. If a company puts out a new cracker or a cookie, they have offered us say a free case of cookies if we will cut the boxes open and sample them right at the check stand; so, as the customers come through the clerks will mention it is a new product on the market and offer them one to try.

On occasion, we have had a display of this particular type in the store where they could get it.

\* \* \* \*

560 Q. Now, would you tell the Trial Examiner in your experience as a manager of a store what are the duties of a clerk? A. The duties of a clerk?

Q. Yes. A. Like I said before I think ninety-five percent of the time he is actually pushing a product and five percent of the time he is checking it out.

\* \* \* \*

Q. What do you mean by pushing a product; does it mean to physically to push it around? A. Our job is to sell merchandise and to sell profitable merchandise.

If we have a product in the store that we consider to be more profitable than another, you know, that is in the same line as basically this other product, we will attempt to merchandise that item, more so than another one of the same type.

\* \* \* \* \*

561 Q. Are you pushing any merchandise this week? A. Yes, I am; would you like to hear about it?

Q. I would, yes. A. Orange juice in half gallon bottles.

All the clerks in the store know about the orange juice. It is a low calorie orange juice with very little acid in it. Any person who has a child that we understand is allergic to orange juice, because of the acid, can drink this product.

It only costs me thirty-seven cents and I sell it for fifty-nine cents; it is a very profitable item.

The clerks are pushing it.

Q. You have instructed the clerks to do so? A. To push this item, that is right.

I have a very large stack right in the front end of the store.

Q. Now, if a customer is not familiar with this orange juice and desires to sample some, can they do so? A. I have a bottle in the back room and I gave two girls last night a taste of it.

I sold three bottles.

562 Q. A bottle of this orange juice, Mr. Greaff? A. A bottle of the orange juice, yes.

Q. So, these samples are available then at the store for tasting this orange which you are demonstrating? A. We do it in all departments.

In the produce department, we, on occasion, cut apples or oranges and let a person try them. That is the produce man.

We have cut pineapples in the past for customers who have said they have never tried a fresh pineapple.

We have cut one and tried putting cubes of pineapple on a plate with a toothpick in it so the people could sample it. It has helped sales.

Q. Now, is this a rather frequent occurrence? A. Yes, I would say it is.

\* \* \* \* \*

563

## CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

564

Q. How frequently do you give demonstrations in your store whereby an outside demonstrator will come in and gives a day or two-day or maybe even a three-day demonstration? A. Approximately once every two weeks.

\* \* \* \* \*

565

Q. Now, those demonstrators are furnished -- that is, they are hired by the supplying company, are they not? A. From what I understand, right.

Q. Well, they are not on the payroll of your store, are they? A. No.

Q. You do not have to be concerned about choosing who or which girl is going to be the demonstrator yourself, do you? A. I can request a certain girl.

Q. You do get acquainted with these demonstrators? A. Right.

Q. So, you do have conversations with the supplier from time to time when a demonstration is being arranged? A. Yes, that is right.

Q. And you have made suggestions? A. Yes, that is right.

Q. But it is the final authority of the supplier, is it not, to determine who the demonstrator will be? A. Yes, I would say his final word would go, but as the buyer, I feel he would put it -- or, put a little more stock in getting the girl I wanted.

566

Q. You mean, he would give consideration to your recommendation or suggestion? A. Right.

Q. Now, is not the salesman for the supplying company normally in the store for the first day of the demonstration when the demonstrator gets there in order to help her get set up? A. For the first hour possibly

he is in there to show her where to -- or to see if I have shown her -- where the extra stock is and make sure there is sufficient follow-on stock available.

Q. Yes, because he is naturally vitally interested to get her started on the right foot, is he not? A. Right.

Q. Then, once she is organized and off on her job, then you indicated either she is capable, -- if she is capable -- then she requires very little if any supervision? A. That is right, yes.

Q. Certainly, it is the salesman of the supplier that suggests to her and recommends to her the type of conversation she should engage in with the customers concerning what she should say about the product? A. Right.

567 Q. And, does he normally work out with her on the first morning just when she is going to go out to lunch and when she is going to take her breaks? A. Well, according to the labor laws, she is entitled to a ten or fifteen minute break every two hours.

Lunch normally follows after four hours work so basically that is taken care of.

Q. It is pretty basic then and there is not too much problem on that? A. Right, the only occasion other than that would be on an exceptionally busy morning when I would hold her maybe an hour before letting her go to lunch.

Q. You, of course, know in advance when a demonstration is going to take place? A. Yes.

Q. You make sure that at the point of the demonstration there is a good large supply of the product on hand when the demonstration begins, is that not correct? A. Space plays a big part in it, yes.

Q. Beg your pardon? A. The space, we build the display according to the amount of space that we have.

Q. Yes, of course. But you make every effort to have a good large supply there? A. That is right.

568 Q. The demonstrators frequently, if they do see their supply running low, they do frequently speak to your clerks, do they not, and ask if the clerks can bring out more merchandise? A. If there is a clerk available. She has complete freedom to go back and get it herself.

Q. All right, you have indicated that the duties of your clerks -- about the duties of your clerks, do I understand you to say that they spend ninety-five percent of their time engaging in suggestive selling?

A. Well, I think they are well aware that people constantly ask questions about a product. They ask the checkers; they ask the stock people on the floor; they even ask the butchers about the products on the grocery side.

569 Q. Do you really mean that, now, that ninety-five percent of the clerk's time is spent making suggestions to your customers as to products they buy? A. I don't think you can say that ninety-five percent of his time is spent standing there talking about the product.

\* \* \* \* \*

Q. But, that is not -- they are not just standing there in the store chatting with customers; they are working? A. They are working.

Q. So, your clerks in your particular store are like clerks in other stores in that they are stocking shelves, are they not? A. Yes.

Q. Checking out customers? A. Right.

Q. Some of the box boys are taking the groceries out to the cars? A. Right.

570 Q. They are cleaning up the store and things like that? A. Right.

\* \* \* \* \*

# 572 FURTHER CROSS EXAMINATION

BY MR. FRAME:

Q. I believe you stated that your store was pushing a particular brand of orange juice? A. Yes.

Q. Do you recall that testimony? A. Right.

Q. Now, do you have someone standing next to the orange juice all day giving away free samples? A. No.



Q. Do you have someone standing there four hours a day giving away free samples? A. No.

Q. Do you have someone standing there fifteen minutes a day giving away free samples? A. I have no one standing there at any time of the day giving away free samples.

\* \* \* \* \*

593

### FERN WALLACE

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. COWELL:

Q. Please give your name and address for the record? A. Fern Wallace, 4641 East Princeton, Fresno, California.

Q. Keep your voice up, Mrs. Wallace, so that everyone may hear you.

What is your occupation? A. I am a Food Demonstrator.

Q. For how long have you been so employed? A. Consistently, for ten years; but, before that, for about two years. So, it would be about twelve years altogether.

Q. Where have you been employed, in what area? A. Through the retail clerks in all of the grocery stores in the Fresno Area and out of town also.

Q. Speaking of out of town, will you give some examples of where you have been employed as a demonstrator out of town? A. In the Nickel's Pay-Less stores in Exeter and Woodlake and Tulare; and, in Hanford, all the stores there.

Also, at Lemoore, Bakersfield, and I have also worked at the coast, at a Giant Food Store there, at Arroyo Grande.

594

Q. Is it true to say then from your testimony that you have worked the gamut from large food chains, like the Giant Food Chain, to the smaller chains, like the Nickel's Chain? A. Yes, we have, we have worked the large supermarkets and we have worked the small stores, the Mom and Pop stores too.

Q. Is there any difference that you find in your job duties as a demonstrator between stores? A. No, they are all the same.

You are there to sell your product and to sell the store.

\* \* \* \* \*

597 Q. Why do you need to know where the other merchandise is kept?

A. If you run out, you should know where it is so you can go and get it.

598 Q. Do you physically go and get it? A. Very often.

Q. Is this merchandise price marked? A. Most of the time, sale merchandise does not have to be price marked. But, sometimes it does. I have price marked some but not too much.

Q. Do you continually during the day, engage solely in either demonstrating products or in replenishing or building your display?

A. Well, if there is a lull in the store, you might help stock merchandise.

Q. Have you done so? A. Yes, I certainly have, lots of times, when there is a lull and I am not neglecting my demonstrating, I do help stock.

\* \* \* \* \*

603

# CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

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Q. Who was the supplier of that product? A. Otto Marston.

Q. Otto Marston? A. Yes, sir.

606

Q. Actually, he works for the Joseph J. Morris Company, is that correct? A. That is right.

\* \* \* \* \*

Q. All right, let me ask you this.

When you worked at Nickel's, I take it then that Otto Marston was the salesman involved on this occasion? A. Yes, sir.

\* \* \* \* \*

Q. Who contacted you on those occasions and asked you to work at the Nickel's stores? A. Mr. Marston.

\* \* \* \* \*

607 Q. And you worked at the Nickel's stores; who paid you; what company paid you? A. Joseph J. Morris.

Q. Who told you what to say in connection with the demonstration of the Chinese food or the olives; that is, what to say to the customers? A. Mr. Marston.

\* \* \* \* \*

Q. When you did work at the Nickel's stores, did you take any equipment with you of any kind? A. Yes, I did.

Q. What was that equipment? A. Well, I had a table and I had an electric skillet.

Q. Did you use the electric skillet in connection with the olives? A. No, sir.

608 Q. You are referring then to the Chinese demonstrations? A. Yes, the demonstrations of the Chinese food.

Q. Whose equipment was that, who owned that equipment, the skillet and the table? A. Part of it was mine and part of it was Mr. Marston's.

Q. What was yours? A. The table.

Q. Did Mr. Marston's company own the skillet? A. That is right.

Q. What about the other equipment, you undoubtedly had little cups or things of that nature, did you not, to give your samples in? A. Yes, I did.

Q. Who furnished those? A. Mr. Marston.

Q. Who was it that told you which days you would actually do your demonstrating when you were at Nickel's? A. Mr. Marston.

Q. Who told you what hours you would work when you were at Nickel's? A. Mr. Marston would usually discuss that with the manager and then he would tell me.

Q. So, they would reach an agreement and Mr. Marston would let you know about it? A. That is right.

609 Q. When you worked at Nickel's in connection with the demonstration of the Chinese food and the olives, did you have any uniform on those occasions? A. I usually wore white uniforms.

Q. White uniforms? A. Yes, sir.

Q. Who supplied you with the white uniforms? A. We supply our own.

Q. Those are your own personal uniforms? A. Yes, sir.

Q. Do the rest of the clerks at Nickel's wear white uniforms of the type that you wore there?

610 A. No, sir.

611 Q. Now, let us say after you were set up and started to work in the Nickel's stores, what other instructions did the store manager have to give you?

A. Most of the time he would not have to give us any other instructions.

## 612 FURTHER CROSS EXAMINATION

BY MR. FRAME:

Q. What would you say your principle duty is as a demonstrator?

A. To promote your product.

Q. How do you do that? A. By giving samples.

Q. Is this the main part of your work? A. That is the main job, yes, sir.

613 Q. As a matter of fact, Mrs. Wallace, that is why you are sent into the retail store, is this not true? A. That is right.

## 619 REDIRECT EXAMINATION

BY MR. LIPPMAN:

621 Q. During the time when you are acting as a demonstrator, Mrs. Wallace, do you receive inquiries from customers about products other than the product or products that you happen to be demonstrating?

A. You certain do.

Q. What type of inquiries do you receive? A. Information as to where you can find something in the store or lots of times about what the product contains and that type of thing.

\* \* \* \*

### RECROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \*

622 Q. Is it not also true, Mrs. Wallace, that during the course of the demonstration that the salesman is present, that is the salesman of the supplier that you are working under is present, and you would talk to him about any problems you might have also? A. Yes, I would.

MR. ARBUCKLE: That is all I have, Mr. Examiner.

\* \* \* \*

623 ROBERT L. CAMPBELL

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

BY MR. ARBUCKLE:

Q. Will you state your name? A. Robert L. Campbell.

Q. And your home address? A. 70 Paseo DeVaqueros.

Q. What city is that? A. Salinas, California.

Q. By whom are you employed? A. Royal Crown Bottling Company, Inc.

Q. What is your position with that company? A. I am the branch manager of the Salinas branch.

Q. How long have you held that position? A. Since October of 1960.

Q. What was your business or position prior to October of 1960?

A. I was vice president in charge of marketing for Royal Crown Cola Bottling Company of Louisville, Kentucky.

\* \* \* \* \*

625 Q. Have you ever given demonstrations at Mead's Market in Monterey? A. Yes, we have.

\* \* \* \* \*

627 Q. Do you say anything about the hours to report to work? A. No, they understand these.

Q. Is that set with your company? A. This is set, and the hours are from 10:00 o'clock to 6:00 o'clock.

Q. You always use the same hours? A. Yes, sir.

Q. What about the subject of lunch periods; is that a matter of discussion? A. They take usually a half hour lunch during that time.

628 Q. Do you direct them to take any special half hour? A. No, the only direction I might give them is to wait until there is a slack time rather than go out right in the middle of a large flow of people in the store.

Q. In other words, they have to use some of their own discretion? A. This is correct.

Q. Now, when you are about to employ or when you have in the past employed a new demonstrator for the first time, who selected the demonstrator? A. I did.

Q. How did you go about finding this person? A. I would usually question one of my other demonstrators and ask them if they know of a lady who has been doing it and I will get their personal recommendation and then call the last -- call the lady in question and ask for an interview at her convenience, whether it be at my plant or at her home, I interview her at that time. If I am impressed with her, I hire her. If I am not, I don't.

I usually go over the method in which we want them to demonstrate, the little talk they are going to give the customer as they sample them.

Q. You mean, this is after you have determined that you will employ the woman? A. This is usually afterwards, yes.

\* \* \* \* \*

629 Q. Once you decide that you will hire a woman to work for you,  
what instructions do you give her as to the things she is supposed to  
630 say when she is handing out the product and her general behavior  
in the store and so forth? A. We have more or less a canned speech,  
you might say.

However, she is to take this and put it into her own words, or adapt it to her own personality and still get the message across in the way that we want it.

This is quite important from the standpoint of whether or not she is just going to walk up and start talking.

Of course, our real intent is to sell product and to have people sample that product.

We feel that the best way for them to get to know a product is by getting it down their throat.

If they are just going to stand by the unit and do nothing but wait for people to come and ask them, no, we cannot use them.

They have to be a little aggressive and walk up to a person, such as in the case of the Diet Rite Cola and say, "Mrs. Housewife, here is the new sugarless Diet Rite Cola, it contains less than one calorie per bottle, have a sample."

As they taste it, then they kind of work into a conversation such as "Is it not good?", or, does it not have a nice bouquet?" or, "doesn't it have a good flavor?"

Then, "Would you like to have a carton to take home?" That is about it.

\* \* \* \* \*

631 Q. Who pays the demonstrators who demonstrate your products?  
A. We do.

Q. Who is "We?" A. The Royal Crown Cola Company.



\* \* \* \* \*

633 Q. Do you use any equipment in connection with your demonstrations? A. Yes, we do.

Q. What is that equipment? A. In some cases, we may use a small wooden bar with plastic basin in which cold bottles are pooled and then opened with paper cups poured and given to them. At other times, we would use what we call a pre-mix unit where the product is pre-mixed and put into a five gallon tank and then all that is necessary  
634 is pulling the valve and putting it into a small cup and it is then given to a consumer.

Q. Who furnishes this equipment? A. Royal Crown Cola.

\* \* \* \* \*

Q. Now, who — strike that.

Do your demonstrators normally give their demonstration at a point very close to where the Royal Crown Cola products are located in the store? A. This is correct.

Q. Who places the initial supply of that product at the point near  
635 where the demonstration is to be? A. Route salesmen would do that.

Q. Is that supply generally larger when you are going to have a demonstration than when no demonstration is going on? A. That is correct.

Q. Now, who would replenish that supply during the course of a day when the demonstration is given if the supply became low? A. We attempt to see that there is sufficient product on there that it will not become low.

However, if it did, she would call us and we would have to send one of our men out to replenish.

If we have a reserve stock in the back room in sufficient amount, it is possible that -- Well, no, she would usually call us.

Q. How about the clerks in the store; is it possible they might go in the back room and bring out some more Royal Crown or Diet Rite Cola? A. That is possible, yes.

Q. What is the general practice according to your knowledge?

A. The general practice is that we build a large enough display that this is not needed.

Q. All right, sir. Do the retail stores ever reimburse you for the cost of the demonstrations? A. No, under no circumstances.

\* \* \* \* \*

636

# FURTHER DIRECT EXAMINATION

BY MR. FRAME:

Q. Mr. Campbell, what do your girls wear when they demonstrate; I assume they wear something? A. Most of them have what you might call a white serving dress which they would term a uniform and we allow them and allowance for the cleaning of this uniform.

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# CROSS EXAMINATION

BY MR. LIPPMAN:

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Q. Now, during the day, for the most part, you do not have a representative of your company present; you do not keep a representative

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present, a salesman in the store; the demonstrator is not accompanied by any representative of the products? A. This is correct.

Q. During that period, is she under the direction of the store manager? A. No, she is under our direction.

Q. The store manager, if he were to direct her to do a certain thing, would he expect her to follow through with those directions? A. Only if he has anything to do with the demonstration itself.

Q. We are talking about in the way she handles the demonstration? A. No, it would not be the prerogative of the store manager.

Q. If the store manager thinks that she is aggressive is he at liberty to say something about it? A. He would have to contact me.

Q. Do you know whether or not the store manager, in fact, does not speak to the girl under those circumstances? A. I have not heard of it.

\* \* \* \* \*

648 Q. Now, when it comes to the lunch hour, is she not expected to consult with the store manager as to the most appropriate time in which she should take her lunch hour? A. No.

Q. Do you know whether or not she, in fact, does? A. I couldn't say whether she does or not, not really, she is not instructed to.

Q. Have you made any inquiries to that effect? A. I have made inquiries as to when they take their lunch hour, yes.

Q. I mean, as to whether or not this met with the approval of the store manager? A. No.

Q. All right. A. She is working for us, not the store manager, so, therefore, she is entitled to the lunch hour when she wants to take it as long as it conforms to, as you said before, if there is a lot of

649 traffic in the store, no, she would not take her lunch.

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654

# PAULINE POWELL

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. COWELL:

Q. State your mailing address; first, state your name and your address for the record? A. Pauline Powell, 825 West Fedora, Fresno, California.

\* \* \* \* \*

Q. Are you employed? A. Yes.

Q. In what classification are you employed? A. Demonstrator.

\* \* \* \* \*

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Q. Now, Mrs. Powell, at this Country Boy establishment, will you tell the Trial Examiner exactly what you did in the demonstration last week? A. As I arrived at the store, I contacted the manager, as usual, and I ask him where he would like for me to put my display or my tray.

Then I check my product to see that it is well stocked and that it has the sale price on it; and, I compare that with other products in the store.

Q. How do you make that comparison? A. In price.

Q. Yes, how do you make the price comparison? A. I go around the store and, as I go around, I am spotting other products too. So, if I am asked where certain items in the store are, then I will be able to tell them because they do consider me as an employee in that store, the customers do.

Also, so does the manager.

\* \* \* \* \*

658 Q. Would you tell the Trial Examiner what you did in those cases?

A. The other demonstrator was serving Coca Cola and I was making what we call sloppy joe's, which is made from Libby's barbequed beef sauce in a can and you warm this in a skillet and you put it on a bun and you sell this.

Q. You sell this? A. Yes, when I enter the store, the manager gives me a cash drawer from the register with a certain amount of change and, at this time, I count my change with the manager; and, I am responsible for this change. Also, I am responsible for the money and the number of buns that I use and that is to coincide with the amount of money at the end of the day.

Q. Does someone check you out at the end of the day to make sure your cash and your bun sales balance? A. Yes, the manager.

\* \* \* \* \*

662 BY MR. COWELL:

Q. In the last eight years, Mrs. Powell, have you, both in large chain store operations, and in smaller operations, demonstrated products?

A. Yes, I have, I have worked in the Ma and Pa store up to the large chain store; and, your Ma and Pa stores are much harder to work in than the larger stores because more is expected of you. They have fewer customers for you to contact and, therefore, there are other duties you can perform during your leisure time.

663 Q. Such as what? A. Well, replenishing the shelves near you; or, if they have more customers in the line than you have to serve, I have boxed groceries.

Q. You have actually boxed groceries in your spare time? A. Yes.

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## CROSS EXAMINATION

BY MR. ARBUCKLE:

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Q. Who pays you; the retail store or the supplying company?

A. The supplying company.

Q. Who tells you what to say in connection with your giving away the samples? A. Usually; that is left up to the demonstrator because that is our profession.

673

We are instructed as to the product and then that is up to us as to how we want to present it.

I mean, as long as we present it effectively, we do not get any other instructions.

Q. However, is it not the salesman who generally tells you about the product, anything in connection with it, so you will be able to develop your sales talk? A. Yes.

Q. And, the salesman gives you quite a few details about the product so you will be able to pass this knowledge on? A. True.

\* \* \* \* \*

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MR. COWELL: For purposes of this record, Mr. Trial Examiner, we are willing to stipulate that demonstrations are usually two days in length.

TRIAL EXAMINER: Are you willing to stipulate, Mr. Arbuckle?

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MR. ARBUCKLE: Yes, sir.

TRIAL EXAMINER: Then, it is so stipulated.

\* \* \* \* \*

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\* \* \* \* \*

Monday, September 27, 1965,  
Room 18201,  
Federal Building,  
San Francisco, California.

\* \* \* \* \*

702

**HOWARD HOUSTON**

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MR. DAVIS:

Q. Will you state your name and give your address, please, Mr. Houston. A. Howard Houston, I live at 1300 Frontera Way, Millbrae.

Q. What is your occupation, Mr. Houston? A. I am the director of Employer Relations for Purity Stores.

Q. How long have you held that position? A. I have held that position for just about a year.

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Q. Will you describe, please, in your own words, what kind of demonstrations you have and how they are arranged for? A. Well, usually an arrangement where a supplier offers to help us with a demonstration in the store, and this is usually to promote the sale of the supplier's products. The products are demonstrated in the store by a store employee, and it is this supplier's products normally which are given away and demonstrated, tasted, that sort of thing.

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Under these circumstances, we normally arrange for the demonstrations, determine where it will be, what the hours will be, and then set up arrangements for the hiring of the demonstrator, and we normally use an agency which is in the habit of supplying demonstrators.

The demonstrator is retail clerks work, and, consequently, the demonstrator is hired to work under the terms and conditions of that contract.



We usually arrange for this through an agency.

Q. In other words, the agency will make an agreement with you to supply these demonstrators, and you stipulate that those demonstrators must work under the terms of the Retail Clerks contracts; is that right? A. We use an agency on that kind of a basis because it is more convenient for us, because if they are regularly supplying demonstrators their help is pretty good.

We provide what the terms and conditions of employment will be, and ask them to set up the demonstrations on that basis.

Q. When you use the term "agency" is that synonymous, in your mind, with the term "licensée," as appears in the contract? A. Yes, it is.

Q. What type of control does your firm exercise over these demonstrations and the work of the demonstrator? A. Well, we determine when a demonstration will take place, what the nature of the demonstration will be, how long the demonstrator will work, what the demonstrator will be paid.

705 Most of this is done in advance. As far as the work itself is concerned, it is planned for, let us say, eight hours of demonstrating hot dogs, giving them away.

We expect the demonstrator to perform in accordance with the plan set up for that demonstration.

Q. Do you sometimes use your employees at work in the stores, that is, the retail clerks who are employed by you under the Retail Clerks contract for demonstrations? A. At times we use our own employees for the demonstration if they are available, if we can spare them.

We would use that employee rather than pick up an extra employee for the demonstration, yes, at times.

Q. Is this type of demonstration and the methods you use to secure and use demonstrators, has this been in effect in Purity Stores since you have been connected with the firm, basically? A. This basic



arrangement has been in effect for as long as I have been there.

In other words, the demonstrating work, as far as we are concerned, has always been clerks work. It has been as long as I have been there.

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## CROSS EXAMINATION

BY MR. ARBUCKLE:

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Q. And what is the general practice as to Folgers? Do they normally make the arrangements for and hire the demonstrator, select the demonstrator, or is that customarily done by the Purity people involved? A. Well, our arrangement is with Kelly Girl as an agency.

We would, once having agreed upon the demonstration and what it would be, we would then direct Folgers to Kelly Girl to make arrangements for the demonstrator.

Q. Who would select the demonstrator then? A. Well, usually the supplier or our store manager for the supplier, one or the other.

\* \* \* \* \*

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Q. Isn't it very possible, Mr. Houston, that in the stores that we have been describing, that is, Merced, Madera, Hanford, Visalia and Porterville, is it not possible that the supplier of the product such as Spreckels or LaChoy or other products are actually making the arrangements for the demonstrations, that they are the ones who are selecting the demonstrator and hiring the demonstrator and paying the demonstrator? A. Yes, it is quite possible. That's normally what happens as I described the situation to you.

The only exception is that the supplier would be paying the agency, but the actual payroll would be Kelly Girl.

\* \* \* \* \*

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Q. Now, in those cases where you do refer the supplier's sales personnel to the Kelly Girl agency, it is true, is it not, the sales representative would have discretion in selecting the actual girl that is used?

I mean from those available he would have a choice as to the demonstrator he would wish to use? A. That's correct.

\* \* \* \* \*

718 Q. Now, isn't it so, Mr. Houston, that it is the general rule that the equipment used in that regard is supplied by the supplier of the item being demonstrated in Purity Stores? A. The equipment that is peculiar to this demonstration, yes, is normally supplied by the supplier.

Q. Yes. Now, isn't it also true, Mr. Houston, that when a product, other than a Purity brand product is being demonstrated in your store, that the sales personnel of the supplier normally instruct the demonstrator as to the nature of the sales talk that will be given in connection with the demonstration? A. Yes. That's usually true.

\* \* \* \* \*

#### 719 REDIRECT EXAMINATION

BY MR. DAVIS:

\* \* \* \* \*

723 Q. Now, you also indicated, however, that since you regarded this as clerks work you regarded the demonstrator then as falling under your contract, or did you so testify? A. That's correct.

Q. What is the significance of that falling under your contract? Now, the girl is paid by Kelly Girl, or there are instances, I suppose, when the individual supplier furnishes her rather than Purity; is that true? A. It is just a convenient way to handle it on somebody else's payroll rather than our payroll.

Since Kelly Girl, through our instigation, set up an arrangement whereby they would agree to use Retail Clerks and work them in accordance with the terms and conditions of the contract and pay the wages provided in that contract, then it is a convenient gimmick to get the paperwork taken care of by somebody else instead of us.

\* \* \* \* \*

#### 726 REVERSE EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

729 Q. In those cases where the supplier pays the demonstrator directly, the supplier does not make contributions to the Health and Welfare fund, does he? A. If he doesn't, then we are responsible under the contract for making them ourselves because it is our agreement.

\* \* \* \* \*

730 FURTHER REDIRECT EXAMINATION

BY MR. DAVIS:

\* \* \* \* \*

BY TRIAL EXAMINER:

Q. Mr. Houston, in response to a question by Mr. Davis, you stated that you regarded the Kelly Girl as a licensee.

Do you -- what do you understand to be the meaning of that term?

A. We have authorized them to make the arrangements for the demonstrators under the conditions that we have set up.

So, rather than hiring the demonstrators ourselves and putting them on our payroll we have authorized Kelly Girl to do this for us.

Q. What are these conditions that you have set up? A. The contract.

\* \* \* \* \*

732 PUG KILPATRIC

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Will you give your name and address to the reporter, please?

A. My name is Pug Kilpatric. My address is Room 811 Flood Building, San Francisco.

Q. What is your occupation, Mr. Kilpatric? A. I am the executive secretary of the Food Industry Labor Service, and as such I negotiate contracts for management in the Food Industry from the Northern

Kern County line to the Oregon border.

Q. How long have you held that position or a similar position?

A. For approximately 14 years.

\* \* \* \* \*

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Q. When you were in the grocery business working in the grocery stores, you and your family, were there such things as demonstrations of products? A. Yes, sir.

Q. Tell us from your own experience what kind of demonstrations?

MR. ARBUCKLE: I would object to that at this moment strictly on the grounds that we don't have any indication of the location of these stores.

BY MR. DAVIS:

Q. Where were your stores located? A. Our headquarters were in Chico. We had stores in Redding, Red Bluff, Oroville, Marysville, Quincy, Keddle, Greenville, Portola, Herlong, Willows, and Westwood.

Q. These towns that you have just mentioned are all in Northern California, are they not? A. Yes, sir.

Q. Now, proceed to tell us about the demonstrations that you had in the stores, and how they worked.

\* \* \* \* \*

734

Q. You may answer the question, Mr. Kilpatrick. A. The first that I recall of demonstrations, I believe, was coffee, and the procedure when these things happened was that the company would come to us and say, "We would like to demonstrate our product in your store. We will give you so much money and so many cases of coffee, and then would you have some of your people take care of the demonstration?"

Q. How would that work? Let's stay with the coffee. How would you put this demonstration on? A. Well, we would get some coffee brewers, and take one or two of our clerks, depending upon what amount of money and coffee involved, and the size of the store, and they would demonstrate.

The first one that I recall was Folgers. They would demonstrate this coffee by serving it and, of course, if they used cream or sugar, then we had that available for them.

Folgers supplied the cups, the little paper cups that had their name imprinted on them.

The rest of it was our responsibility.

\* \* \* \* \*

735 Q. Now, was this kind of demonstration also performed for other products during this period? About when are we talking about, Mr. Kilpatric, what years? A. This period was in the late '30's.

Q. All right. Now, in addition to the coffee would other products be demonstrated in this same manner in your stores? A. Yes, sir. I don't now recollect many of them that needed to be prepared.

The rest would be stuff like juices or cheeses. All they had to do was put out cheese on crackers, and with the juices all you had to do was open a can or bottle.

Juices was relatively new at the time, and they would open the can or bottle and give samples in little paper cups.

Q. This would be done by the clerks? A. Yes, sir.

Q. At that time, still in the '30's, did the suppliers have their own demonstrators they would send into your stores? A. At that particular time, none that I recall.

Q. So the arrangement then was that the supplier would reimburse you for the expenses of putting on this demonstration? A. Yes, sir.

736 Q. Now, was there a change in this practice while you were still in the grocery business? A. Yes, sir. After the enactment or rather when the Government announced they were going to enforce the Robinson-Patman Act, many companies became afraid. It was always a blanket sum of money, and subsequently many of the suppliers felt that they might be accused of being in violation of the Robinson-Patman Act, and, therefore, they suggested that they would use one of our people but they would reimburse us the exact amount that she was entitled to for the day.

Q. So that it still remained the job of one of your retail clerks to perform the demonstration; the only difference was that the supplier would actually reimburse you for the salary, is that right? A. Yes, sir.

Q. Was there any other change in their method of demonstrating while you were still in the grocery business? A. Yes, sir. The last few years before I left and came down here -- it wasn't a change. It was an addition. The former method was still used by some of the companies, but, on the other hand there began to be people who we knew would be available for demonstrations, and rather than shorten our work forces, as they usually held these demonstrations on Friday and Saturday, and as the stores were getting bigger and more volume, they would ask us to get somebody else.

737 In this case they were our people, I assume, but they were being paid directly by the supplier, and they were not people on our weekly work staff.

\* \* \* \* \*

738 Q. As a matter of fact, at one time one of the employers that was represented by your organization was Nickel's Pay-Less Stores, was it not? A. Yes, sir.

Q. Is Mayfair one of the firms that is represented by you? A. Yes, sir, but not through Food Industry Labor Service.

\* \* \* \* \*

739 Q. Will you describe for us what your view is of the meaning of "or a licensee of said employer" based upon the discussions in the negotiations? A. Yes, sir. The first discussion on it came about in San Francisco where it is very unique. The Food Industry is very

740 unique in San Francisco in that we have more employers per capita than any city in the world in the retail grocery business, and lots of these employers have auditors or accountants, I should say, that only come to them like once every two weeks, and at this time they write the payroll checks and this sort of thing, so we object to, or I objected



on behalf of the industry to having to put the demonstrators directly on our books because many of these people had never done any direct accounting of their own, and at least it would mean that we would have had to change the contract requiring when these people get paid because they wouldn't have gotten paid until the accountants came around, and we agreed that if the Unions would add the words "or licensee" that we would still be the responsible party to see that the people got all of the benefits under the contract, but that it would be permissible for the supplier to directly pay the demonstrator or it would be permissible to get them from an agency, which the agency would be responsible, would pay them, but it would be responsible for the conditions of the contract.

\* \* \* \* \*

#### CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

743 Q. As I understand it, then, you would return from time to time to the scene of the demonstration to see that the cups and product was replenished, see that everything was in order? A. Yes.

Q. It wasn't a situation where you would stand there for two or three days and do nothing but pass out cups of juice? A. No, sir.

\* \* \* \* \*

751

JAMES F. ALEXANDER

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

BY MR. DAVIS:

Q. Will you give your name and address, please, Mr. Alexander?

A. James F. Alexander, 2731 Third Avenue, Sacramento, California.

Q. What is your occupation? A. Secretary-treasurer of Retail Clerks Union, Local 588.

Q. That's an executive office of that Union? A. Yes.



Q. How long have you held that position? A. Since 1937.

Q. Prior to that time what was your occupation, please? A. I was manager of an Inland Chain Store.

755 Q. During the period from 1922 to 1928 when you were a grocery clerk, from time to time were there free samples passed out to the public of products sold in the store where you worked? A. Yes, there were.

Q. And how was this done? A. It was done by the personnel, the clerks in the store.

Q. Can you give us some examples of what was done? A. I can't recall all of the items. ;

For example, juices and canned fruits and vegetables and cheeses.

We would get these big cheeses and cut them ourselves, cut them in cubes, and put toothpicks in them, and as people would come in they would sample the cheese, and perhaps buy a package of cheese that we had wrapped up and priced.

\* \* \* \* \*

756 Q. Now, after you became secretary-treasurer of Local 588,  
757 at what period since then did you notice, if you did, a change in the method of demonstrating the products in retail grocery stores?

A. Well, the first time that it was brought to our attention by members of our Union was in the early '50's, that the suppliers were beginning to engage in the practice of hiring demonstrators to come to the stores and do a demonstration aside from the regular staff, regular personnel.

Q. What did your Union do about that? A. Well, at that time then we took these people into the Union and informed the employers that they were covered by the contract.

Q. When you say employers, what employers do you mean? A. The grocery employers with whom we had the contracts.

Q. You didn't go to the suppliers and seek any contract from them, did you? A. No.

760

## CROSS EXAMINATION

BY MR. ARBUCKLE:

Q. In those days did you have a person who stood by the product the entire day and did nothing but pass out the particular juice or particular fruit juice for a full day's job? A. Yes. If the volume of business warranted it, yes.

769

## AFTERNOON SESSION

1:30 p.m.

TRIAL EXAMINER PENFIELD: The hearing will be in order.

MR. ARBUCKLE: Before Mr. Davis calls his next witness, I would like to propose a stipulation in regard to the subject of commerce.

I would propose the following stipulation, Mr. Examiner:

That James Mead and Roger Mead, co-partners, doing business as Mead's Markets, that those two gentlemen maintain on a daily basis a record of their gross sales for the day, and those figures are placed on a monthly sheet so that at the end of January 1964, for instance, there would be a daily record of the gross sales in the store for each day of the month.

We have produced and made available for Mr. Davis's examination the monthly sheets for the months of 1964, and each of those sheets has at the bottom a total figure which shows the gross sales of Mead's Markets for that particular month.

We have then added the gross sales for the 12-months of 1964, that is, I should say, the accounting firm of Jones & Lowery have added those and provided us with the addition tape which shows that in 1964 Mead's Markets gross sales was \$544,174.42.

I would also add in the stipulation that this figure deviates about \$3,000 from the testimony of Mr. Mead in this regard, and I would clarify that by stating the \$544,000 plus figure includes state and local

770 sales taxes while the figure that Mr. Mead gave on the witness stand did not include those sales taxes.

I propose that stipulation.

TRIAL EXAMINER: Do you so stipulate?

MR. DAVIS: I will stipulate that the records as described by counsel for the General Counsel have been produced and that those particular records show those particular gross sales for the year 1964.

TRIAL EXAMINER: All right. Very good.

\* \* \* \* \*

807

GEORGE KISLING

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

# DIRECT EXAMINATION

BY MR. DAVIS:

Q. Your name and address, please? A. George Kisling, 265 North Fresno Street, Fresno, California.

Q. What is your occupation, Mr. Kisling? A. President and executive officer of Retail Clerks Local 1288.

Q. How long have you held that position? A. Well, the title has changed, but the position is the same. Since 1942.

\* \* \* \* \*

808

Q. Starting with the period in 1958, while you were owner of the grocery store in San Francisco -- what was the name of that store?

A. George & Earl's Delicatessen.

Q. Did you have in that store -- Did you demonstrate any products or give out free samples? A. Well, we did it on our own, that is correct, at the delicatessen counter.

809

Q. Describe what you did? A. Well, I can recall Kraft cheeses. We used to -- When the salesman would come and call on the store, I can remember Kraft Foods. I can remember Albert Milk Company. They also had cheeses in little jars.

The drivers would once or twice a month leave two or three jars of extra cheese for demonstrations over the counter for people to sample.

Then we would hit the cracker man for an extra box of crackers, and we would serve crackers and cheese over the counter.

This was true at my little store practically every day.

Q. You always had some kind of product to give free samples to the customers? A. This is correct.

Q. These samples would come from wholesale suppliers of the products? A. Or driver salesmen.

Q. Driver salesmen who were delivering those products? A. That is correct.

Q. What kind of financial arrangements did they make with you for these demonstrations? A. Oh, they would probably leave three or four extra packages of cheese to make up for it.

810 Q. Now, when you went to work for Black's in Fresno in the delicatessen department there, did you give out free samples? A. Yes, we did, on the same basis, over the delicatessen counter.

The department was about half the size of this room, and there would be four to eight employees in this one department, and I was the assistant to the manager of the department, and we would on weekends cut up big wheels of cheese, take toothpicks and stick them in the little squares of cheese, set them out on the counter, and we would also cut up pre-cooked hams the same way.

Whatever the specials were, we would have samples over the counter.

The same with salads. We would get salads and give it to the customers who wanted a sample.

Q. You mentioned whatever the specials were. Do you mean the particular product you were promoting that weekend? A. Yes.

\* \* \* \* \*

812 Q. So, if I understand your testimony correctly, in the late '40's or the early '50's the demonstrators who were furnished or sent

into the stores by suppliers became members of your Union? A. That is correct.

Q. And they have remained so since? A. That's correct.

\* \* \* \*

815

## CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \*

817

Q. You are not familiar with the actual arrangements between the supplier and the retail store? A. No. It is none of our business.

Q. You are not actually concerned with which one it is, are you, as long as the Union wages are paid? A. Wages and conditions, right.

\* \* \* \*

828

## MARGARET HEINTZ

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. COWELL:

Q. Will you state your name and address for the record, please?

A. Margaret Heintz, H-e-i-n-t-z, 1306 Granada Avenue, Salinas.

Q. Are you currently employed, Mrs. Heintz? A. No.

829

Q. Have you been employed? A. Recently?

Q. Yes. A. Yes.

Q. In what classification have you been employed? A. As a demonstrator.

Q. For how long have you pursued that line? A. For approximately 10 years.

\* \* \* \*

831

Q. Now, was there any discussion between yourself and the store manager at that time as to the pricing of the merchandise? A. Yes. They decided to put it all at a special price of 49 cents, which I repriced all of the merchandise.

\* \* \* \*

835 Q. In your opinion, Mrs. Heintz, is any prior training necessary to demonstrate a product? A. I don't believe so. Only knowledge of the product you are selling.

Q. Let's take that for a moment, knowledge of the product you are selling. From where do you obtain this? A. Well, generally the company or companies will send you a fact sheet about their product that tells you a little bit about this particular thing, and the points they would like for you to discuss with the customers.

Q. This is the only thing you obtain in the normal course of events from the supplier, and you go ahead and put on your demonstrations from the fact sheet? A. That's correct.

Q. About how long would it take for you to read the fact sheet?  
A. Oh, usually five or ten minutes.

\* \* \* \* \*

836 Q. On those occasions where you have performed this type of multiple demonstration, have you received any money from the store manager? A. To conduct my work with, yes. They give me money, and then it is checked out.

Q. Do you balance this out at the end of the day? A. Yes.

Q. With whom? A. With the store manager.

\* \* \* \* \*

837 Q. You not only took a physical inventory and count of the merchandise you were demonstrating, but you also inventoried like products that were available for sale in the store? A. Yes.

Q. Now, who requested that you do this? A. This was part of my instructions from the Edwards Coffee Company. This was the way I was to conduct this demonstration.

Q. Edwards Coffee Company is a division of Safeway? A. Yes.  
It is Safeway.

\* \* \* \* \*

838

## CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

841

Q. In any of these demonstrations have you ever been paid by anyone other than the supplier for whom you were working? A. Do you mean like Safeway Stores, I have been on the Safeway Stores payroll.

Q. Were you demonstrating a Safeway product? A. Yes, I was.

Q. Have you ever demonstrated a non-Safeway product in a store? A. Yes, I have.

842

Q. Can you give us an example? A. Coca-Cola and Diet Rite.

Q. Who paid you on those occasions? A. I was paid by the supplier.

Q. You were paid by Coca-Cola and Diet Rite Cola? A. Yes.

\* \* \* \* \*

Q. Has it ever happened that a supplier has called you directly and asked you to work as a demonstrator? A. Well, people I have worked for for many years, like Coca-Cola Company, they have called me direct because I have done their work down there for a long time.

Q. Is that the general practice when a supplier or supplier salesman is acquainted with you or knows you, then he calls you directly?

843

A. This generally happens after you have worked for them and they like your work.

\* \* \* \* \*

844

Q. You spent a good part of the year working as a demonstrator for Diet-Riet? A. Yes.

Q. That would be how many days a week? A. Two.

Q. Was Mr. Campbell with the company at that time? A. Yes, he was.

Q. Now, on those occasions Mr. Campbell conferred with you from time to time, did he not, as to what he wanted you to say in connection with your demonstration? A. That's right.



Q. And he was the person that told you where he wanted you to report, that is, to the store? A. Yes.

Q. And he indicated to you the hours he wanted you to work on a particular day? A. Yes.

Q. And Diet-Rite Cola Company paid you? A. Yes.

Q. And when you had any unusual problems in connection with your demonstration you would call Mr. Campbell or someone at the Diet-Rite Cola Company, would you not? A. Yes.

Q. And they would attempt to resolve any problems that you called in about, wouldn't they?

845 A. Yes.

\* \* \* \*

847 Q. Now, did you receive any directions at all from any of the managerial people at Mead's Markets as to the nature of your demonstration during the occasion you were at Mead's Markets? A. I believe the only thing that came up was about the location in the store, where I was to demonstrate.

\* \* \* \*

848 Q. When you gave your demonstration at Mead's, if I understand you correctly, you were thoroughly familiar with demonstrating for Diet-Rite and you would carry on your regular demonstrating practices? A. I believe so.

Q. Once you became acquainted with a product like that, can you think of any supervision that you would actually require during the course of the day once you had your place of demonstration established?

A. I don't know whether there would be any other supervision you needed or not.

\* \* \* \*

851

# BEVERLY CLIZBE

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

\* \* \* \*

852

## DIRECT EXAMINATION

BY MR. COWELL:

Q. Will you state your name and address? A. Beverly Clizbe,  
C-l-i-z-b-e, 5355 Ramona Avenue.

Q. In Salinas? A. Yes.

Q. And you are currently employed as a demonstrator; is that  
right? A. Yes.

Q. For how long have you been so employed? A. About four  
and a half years.

\* \* \* \* \*

855

Q. When you demonstrate such a product as the dip, do you have  
occasion to engage in suggestive selling of other products that the food  
employer carries? A. Sometimes.

Q. Do you have any particular example of that in mind? A.  
Well, sometimes the housewives would like to have sour cream that's  
non-fattening and would ask me if I know of one in particular, and if I  
can help them I show her which kind is non-fattening.

\* \* \* \* \*

867

Q. Have you had occasion to inventory your sales? A. Yes.

Q. Have you ever engaged in building of an initial display?  
A. Many times.

Q. And by an initial display, what do you mean? A. Well, with  
Royal Crown, I at times have brought cartons in from the back room.

Sometimes I take them off of larger displays and build it where  
I am supposed to have my demo put up.

Q. Do you replenish that display during the day as you are  
demonstrating? A. Yes, I do.

Q. Have you ever priced marked merchandise? A. A few times.

\* \* \* \* \*

868

## CROSS EXAMINATION

BY MR. ARBUCKLE:

\* \* \* \* \*

871 Q. In your four and a half years of demonstrating has it ever occurred that you were paid by the retail store where you gave the demonstration rather than by the supplier of the goods, whose goods you were demonstrating? A. They never paid me.

Q. Who never paid you? A. The store.

Q. It was the supplier on each occasion? A. Yes.

\* \* \* \*

872 Q. Well, I am not asking who knows about it.

873 There may be quite a number of people who know about it. What I am trying to determine, Mrs. Clizbe, is just what the supplier's representative tells you on those occasions when he does call you directly.

A. Uh-huh.

Q. Among other things, does he indicate to you which store he would like you to give the demonstration in? A. Yes.

Q. Does he indicate the hours he would like you to give the demonstration in? A. Yes.

Q. Does he indicate to you when he would like you to take your lunch break during the demonstration? A. No.

Q. Does he indicate to you what equipment would be necessary in connection with the demonstration? A. Yes.

\* \* \* \*

876 Q. Once you have been assigned your location in the store and you know your hours, and you know your products, there really isn't much further supervision you need during the course of a particular demonstration, is there? A. I guess not.

Q. Because you have had experience in this line? A. Uh-huh.

Q. I don't imagine you have found yourself short on words for your product; you know your product, and you know what to say about it; is that right? A. That's right.

Q. And you are familiar with what is expected of you? A. Yes.

Q. So you are able to carry it out without having to have close supervision? A. Uh-huh.

Q. Is that right? A. Right.

\* \* \* \*

GENERAL COUNSEL'S EXHIBIT NO. 17

**MASTER FOOD AND LIQUOR AGREEMENT  
RETAIL CLERKS LOCAL UNION NO. 1288 AFL-CIO**

This Agreement, made and entered into this \_\_\_\_\_  
by and between the RETAIL CLERKS UNION LOCAL NO. 1288, char-  
tered by retail Clerks International Association, AFL-CIO, hereinafter  
referred to as the Union, party of the first part, and \_\_\_\_\_  
\_\_\_\_\_ hereinafter referred to as party  
of the second part.

**W I T N E S S E T H**

In consideration of the premises, and of the respective promises,  
agreements and covenants of the said parties hereto, they do hereby  
mutually agree as follows, to wit:

**Section 1 — RECOGNITION AND CONTRACT COVERAGE**

(a) **RECOGNITION:** The Employer hereby recognizes the  
Union as the sole collective bargaining agency for an appropriate unit  
consisting of all employees working in the Employer's retail food  
stores within the geographical jurisdiction of the Union (Merced, Mari-  
posa, Madera, Fresno, Tulare, and Kings Counties), except meat depart-  
ment employees and supervisors within the meaning of the National  
Labor Relations Act, as amended.

(b) **CLERK'S WORK.** The work covered by this Agree-  
ment shall be performed only by members of the appropriate unit as  
defined in Section 1 (a) hereof and such work shall consist of all work  
and services connected with or incidental to the handling or selling of  
all merchandise offered for sale to the public in the Employer's retail  
food stores including the demonstration of such products, but excluding

(1) supervisory functions; (2) such work as may be performed by employees working exclusively in the meat department and who are engaged in the handling, cutting, selling, processing, wrapping, or displaying of fresh frozen or processed meats, poultry, fish and seafood products in said department; (3) work of employees heretofore expressly excluded from the provisions hereof by agreement of the parties; and (4) subject to the terms and conditions applicable to the area of non-food merchandise as hereinafter set forth in sub-section (c) of this Section 1, such work as is performed under prevailing practices within the geographical jurisdiction of Local 1288 at the point of delivery by a driver-salesman engaged in servicing the retail food stores with merchandise directly from a delivery vehicle.

\* \* \* \* \*

(d) SUBCONTRACTING AND SUB-LEASING. It is recognized that the Employer and the Union have a common interest in protecting work opportunities for all employees covered by this Agreement. Therefore, except for work which is exclusively inventory or janitorial work (such as washing windows, washing or waxing floors and cleaning rest rooms) or work hereinabove excluded, no work covered by this Agreement, as defined in Section 1 (b) hereof, shall be performed under any sub-lease, subcontract, or other agreement unless the terms of said lease, contract, or other agreement specifically provide: (1) that all such work shall be performed only by members of the appropriate unit as defined in Section 1 (a) hereof; and (2) that the Employer, party hereto, shall at all times hold and exercise full control of the terms and conditions of employment of all such employees pursuant to the terms of this Agreement.

It is recognized that if the terms of the Employer's lease, contract or other agreement obligates the lessee or other party, as the case may be, to pay the wages and observe the other terms and conditions of this Agreement, then the Union agrees that the sole and entire financial

responsibility for meeting the costs of observance of this Agreement shall be upon said lessee or other party and not upon this Employer and that he shall be, and by these presents is, hereby released from any and all financial liability in connection therewith.

\* \* \* \* \*

#### SECTION 11 — GENERAL PROVISIONS:

\* \* \* \* \*

g. LEAVES OF ABSENCE: Upon request the Employer agrees to grant to any employee who has been in the continuous service of the Employer for one (1) year or more, a written leave of absence not to exceed thirty (30) days for certified illness or injury.

\* \* \* \* \*

GENERAL COUNSEL'S EXHIBIT NO. 18

## MASTER FOOD AGREEMENT

b e t w e e n

RETAIL CLERKS UNION LOCAL No. 839

984 Lupin Drive / Salinas, California

a n d

FOOD EMPLOYERS

of the counties of

MONTEREY, SANTA CRUZ and SAN BENITO

Effective

JULY 1, 1964 to JUNE 30, 1967

\* \* \* \*

## Section 1.

## RECOGNITION AND CONTRACT COVERAGE

\* \* \* \*

(d) Subcontracting and Subleasing: It is recognized that the Employer and the Union have a common interest in protecting work opportunities for all employees covered by this Agreement. Therefore, except for work which is exclusively inventory or janitorial work (such as washing windows, washing or waxing floors and cleaning rest rooms) or work hereinabove excluded, no work covered by this Agreement, as defined in Section 1 (b) hereof, shall be performed under any sublease, subcontract or other agreement unless the terms of said lease, contract or other agreement specifically provide: (1) that all such work shall be performed only by members of the appropriate unit as defined in Section 1 (a) hereof; and (2) that the Employer, party hereto, shall at all times hold and exercise full control of the terms and conditions of employment of all such employees pursuant to the terms of this Agreement.

It is recognized that if the terms of the Employer's lease, contract or other agreement obligates the lessee or other party, as the case may be, to pay the wages and observe the other terms and conditions of this Agreement, then the Union agrees that the sole and entire financial responsibility for meeting the costs of observance of this Agreement shall



be upon said lessee, or other party and not upon this Employer and that he shall be, and by these presents is, hereby released from any and all financial liability in connection therewith.

\* \* \* \* \*

TXD-(SF)-20-66  
Farmersville, Calif.  
Monterey, Calif.

\* \* \* \* \*

Before: Louis S. Penfield, Trial Examiner.

### TRIAL EXAMINER'S DECISION

#### Statement of the Case

This proceeding with all parties represented was heard before me in Fresno, California, on September 21, 22, and 23, 1965, and in San Francisco, California, on September 27, 1965, on a complaint of the General Counsel and answer of Retail Clerks International Association, Local Union No. 1288, AFL-CIO, and Retail Clerks International Association, Local Union No. 839, AFL-CIO, herein collectively called Respondents. <sup>1/</sup>

The issues litigated were whether respondent Local 1288 violated Section 8(b)(3) and Section 8(b)(4)(i)(ii)(A) of the Act, and whether respondent Local 839 violated Section 8(b)(4)(i)(ii)(A) of the Act. At the opening of the hearing a motion to intervene by Retail Clerks International Association, herein called the International, the parent body of respondent Local unions, was granted.

Upon the entire record, including consideration of briefs filed by the parties, and upon my observation of the witnesses, I hereby make the

---

1/ The consolidated complaint issued on August 4, 1965, and is based on charges filed with the National Labor Relations Board, herein called the Board, on the following dates: In 20-CB-1327 a charge filed on January 1, 1965, and an amended charge filed on July 6, 1965; in 20-CC-481 a charge filed on January 12, 1965; and in 20-CC-489-1 a charge filed on February 8, 1965. Copies of the complaint, the charges and the amended charges have been duly served upon Respondents.

following:

### Findings of Fact

#### I. The businesses of the companies

Nickel's Pay-Less Stores of Tulare County, Incorporated, herein called Nickel's, is a California corporation with its principal place of business in Farmersville, California. It is engaged in the retail sales of groceries, foodstuffs, liquors, and sundries at three stores located in Tulare County at Woodlake, Exeter, and Farmersville. During the past calendar year in the course and conduct of such business Nickel's gross sales exceeded \$500,000. During the same period Nickel's purchased goods valued in excess of \$50,000 from suppliers located in California, which had received such goods directly from points located outside the State of California.

James Mead and Roger Mead, co-partners d/b/a Mead's Market, herein called Mead's, have their principal place of business in Monterey, California. At all times material herein Mead's has been engaged in the retail sale of groceries, foodstuffs and sundries at its store located in Monterey, California. During the past calendar year, in the course and conduct of such business, Mead's gross sales exceeded \$500,000. During the same calendar year Mead's purchased goods valued in excess of \$19,000 which originated at points located outside the State of California.

The incidents which are the subject matter of the complaint in this proceeding all involve Nickel's or Mead's. I find that at all times material herein, Nickel's and Mead's were each engaged in businesses which affect commerce within the meaning of the Act, and that the assertion of jurisdiction in this proceeding is warranted in accord with current Board jurisdictional standards.

#### II. The labor organizations involved

Retail Clerks International Association, herein called the International, Retail Clerks International Association, Local Union No. 1288, AFL-CIO, herein called Local 1288, and Retail Clerks International Association, Local Union No. 839, AFL-CIO, herein called Local 839, are each labor organizations within the meaning of Section 2(5) of the Act.

### III. The alleged unfair labor practices

#### A. The charges and the controversy

The complaint alleges that Local 1288 and Local 839 are the respective statutory representatives of Nickel's and Mead's, and that in the course of collective bargaining negotiations each local demanded that the employer enter into a collective bargaining agreement containing certain provisions regarding the employment of demonstrators which the General Counsel claims to be unlawful within the meaning of Section 8(e) of the Act. It is further alleged that following such demands, and the refusal of each employer to accede thereto, the respective locals engaged in strikes and picketing at each of the retail stores with an object of forcing or requiring each employer to enter into an agreement containing the unlawful clauses. Such conduct is asserted to violate Section 8(b)(3) and 8(b)(4)(i)(ii)(A) with respect to Nickel's, and Section 8(b)(4)(i)(ii)(A) with respect to Mead's. Respondent acknowledges that disputes regarding the so called demonstrators' clauses arose in the course of collective bargaining negotiations, and concedes that an object of the subsequent strikes and picketing was to obtain such clauses. Respondents, however, insist that the clauses in question are not unlawful within the meaning of Section 8(e), and that accordingly any picketing or strike activity designed to obtain them was lawful and constitutes neither a violation of Section 8(b)(3) nor of Section 8(b)(4)(i)(ii)(A).

The controversy arises in the retail grocery industry of Northern California. The clerks in stores comprising a substantial part of such industry have for many years been covered by collective agreements with various locals of the International. Much of the collective bargaining has taken place on a multi-employer basis.

Nickel's and Local 1288 were parties to collective bargaining agreements for some 15 years prior to the instant controversy. Food Industries Labor Service, Inc., which represents a large number of employers in Northern California, had represented Nickel's in negotiations which resulted in a 3-year contract in 1961. At an appropriate

time near the expiration date of the 1961 contract Nickel's withdrew from the multi-employer group, and advised Local 1288 that thereafter it would bargain directly with that local on its own behalf.

Prior to 1964, employees at Mead's had not been represented by a labor organization. On August 20, 1964, following an unfair labor practice proceeding based on charges filed by Local 839 against Mead's, the Board issued an order finding that Mead's had engaged in certain unfair labor practices, and directed that it bargain with Local 839 as the statutory representative for grocery clerks in its Monterey store. James A. Mead and Roger Mead, copartners d/b/a Mead's Market 148 NLRB 383.

Following the expiration of the 1961 contract on March 31, 1964, industry-wide negotiations for a new agreement commenced. These culminated in the negotiation of a new master agreement covering the Northern California grocery industry effective for a three year period commencing in 1964. Local 1288 and Local 839 were each parties to the master agreement insofar as it covered retail stores within their respective territorial jurisdictions. The master agreement contained so-called demonstrator clauses. It was the refusal of Nickel's and Mead's to agree to the inclusion of identical demonstrator clauses in contracts covering their respective employees that brought about the charges herein. Properly to evaluate the significance of the demonstrator clauses we must consider (1) demonstrators' work as it has evolved in the Northern California grocery industry generally, and as it is now, and has been, performed in the industry as a whole and at Nickel's and Mead's in particular; and (2) the clauses demanded of the employers and the background from which they emerged.

#### B. The work of demonstrators

In the broadest sense demonstration at a retail grocery store consists in handing out samples in an effort to promote the sale of a given product. Many products are, of course, not suitable for demonstration, but some, such as soft drinks, ice cream, cheese, certain meat products, and coffee, can be passed out in small quantities to store customers in an

effort to stimulate their interest in the particular product. The practice is a form of sales promotion which, together with newspaper advertising, posters, and the building of displays is aimed, not only at promoting immediate sales of the brands being sampled, but also at creating a continuing demand for such product, thus increasing store traffic and resulting in increased sales of all products. The practice is far from a new one, although the exact manner in which it is now being performed has undergone some changes during the years.

Prior to World War II, some store owners, or managers, on their own volition undertook to promote the sales of particular products by directing their clerks to hand out samples to the customers. This did not usually occur in circumstances where it became the full-time duty of the clerk for even a single day, but was most often carried out as an adjunct to the clerk's basic duties of stocking shelves, checking, and building displays. Since retail grocery stores normally carry a variety of competing products, a supplier of a particular brand might press a store owner to feature his brand, rather than that of a competition, by the medium of passing out samples. As an inducement to the store owner to undertake promotion of a particular product, the supplier not only would agree to reimburse the store for the cost of the samples given out, but he might also offer the store owner an advertising discount or special price on the product, and in some instances might even undertake to reimburse the store owner for the clerk's wages during that period of time which the clerk devoted exclusively to demonstrating the supplier's particular brand.

During World War II, shortages of both products and personnel caused the practice of demonstration to be largely abandoned. Following World War II, however, demonstrations were resumed, and shortly thereafter the present practices came into being. Six demonstrators, five suppliers, and six store owners, including the owners of both Nickel's and Mead's, testified concerning the present demonstration practices in Northern California. Although minor variances appear in their testimony,



they exist principally as to matters of emphasis. The record as a whole discloses no differences of consequence concerning the nature of the work done by either clerks or demonstrators during the post World War II period up to and including the present.

For a variety of reasons having no particular relevance to this proceeding, following World War II the use of clerks as demonstrators fell into disuse, and the practice developed of having demonstrations conducted by individuals hired by and paid by the suppliers. Out of this evolved the current practice which appears to be followed generally in Northern California, including the Fresno-Tulare and Salinas-Monterey areas, and in particular in demonstrations at Nickel's and Mead's. Currently a typical demonstration will be initiated by a communication from a supplier to a store owner seeking his agreement to hold a demonstration at a particular store at an agreed upon time. If agreement has been reached, the supplier will thereafter employ a woman to conduct the demonstration. Most demonstrations will be scheduled for the two busiest store days, usually Fridays and Saturdays. Suppliers testified that they undertook to employ as demonstrators women who had pleasing personalities, nice appearances, and the facility for talking easily with store customers. When hiring a new demonstrator the suppliers stated that during the course of an initial interview they undertook to instruct the prospective demonstrator concerning her functions, and to furnish her with some oral or written information concerning the virtues of the particular product to be demonstrated. Training given, however, was neither extensive nor exacting. The supplier furnishes the tables, pans, cups, and any other special equipment which may be needed to carry on the particular demonstration. The supplier bears the cost of all products that the demonstrator gives out to store customers as samples. In some cases a store owner, in anticipation of increased sales to result from the demonstration, has his clerks prepare a display of the demonstrated item in advance of the day of demonstration. Usually the demonstrator will be placed at or near the point where the items are shelved or displayed. The store owner in most instances will stock the item more

heavily than is usual on such occasions, both in anticipation that increased demand will result from the demonstration itself, and because many times the supplier will offer the store owner a particularly good price on the items as an inducement for permitting the demonstration. On the day of the demonstration the demonstrator will arrive at a store and set up her equipment. She may or may not be accompanied by the supplier or one of his representatives. The hours she is to work have usually been agreed upon in advance between the supplier and the store owner, and normally will be geared to the times when the store expects the most customers. The demonstrator will report to the store manager or owner and be instructed by him as to where the demonstration is to be set up, and reach an understanding as to the most appropriate time for her to take her lunch break. The remainder of her time will be spent at handing out samples to customers in the store, talking to customers of the merits of the product, and urging them to purchase it. If the customer indicates an interest in purchasing, the demonstrator may assist him by taking an item from the display or shelf and placing it in his grocery cart. As the displayed stocks become depleted the demonstrator may, and frequently does, undertake to replenish them by going herself to the storeroom in the back of the store, although in some instances help in this regard may be sought and obtained from store clerks. The demonstrator keeps a record of the products used in her demonstration which she gives to the store manager at the end of the day so that he may obtain reimbursement from the supplier. The supplier or his representative usually will visit the store once or twice during the course of the demonstration, but he rarely stays for any protracted period. During most of her stay at the store such instructions as the demonstrator may need come from the store manager, although it does not appear that customarily any substantial degree of supervision is required. In most instances, particularly in the larger supermarkets, demonstrators are occupied full time in handing out samples. Occasions may arise, however, particularly in some of the smaller stores, when business will be slack, and at such



times in some instances demonstrators may undertake to assist clerks in marking prices, replenishing shelves with items other than those they are demonstrating, and at times even helping to bag groceries. Upon completing the demonstration, the demonstrator will take the supplier's equipment and depart. She will normally be carried on the supplier's payroll and will be paid directly for her services by the supplier. The supplier will not be reimbursed by the store owner in any way for the demonstration.

The supplier usually initiates the scheduling of demonstrations, but at times, particularly where a special sale or special occasion is planned, a store owner may solicit a supplier to set up a demonstration. It seems clear from the record as a whole that the practice of conducting demonstrations is one which is deemed to be of mutual benefit to both the store owner and the supplier. The suppliers regard a demonstration as a form of advertising which stimulates the sales of their products not only immediately at the situs of the demonstration, but also hopefully in the future at the same or other stores carrying the product. The store owners benefit from increased traffic resulting from the demonstration. The store owners will advertise a demonstration in the hope that the prospect of free samples will lure customers to the store, not only to obtain the samples, but also while there to purchase both the demonstrated product and a variety of other products.

There is nothing to show that practices regarding demonstrations at Nickel's and Mead's differ in any material degree from those prevailing in the rest of the industry as described above. Apparently, however, at neither store had it ever been the practice to use regular clerks to pass out samples. <sup>2/</sup>

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2/ Owners of both Nickel's and Mead's testified that on occasion each had passed out samples, but apparently this had been sporadic, and any demonstration of real consequence at either store had been carried on in the manner described above with the supplier furnishing the demonstrator.

When the locals first became aware of the developing practice of the suppliers' furnishing the demonstrators, they notified the store owners that they regarded the demonstrators as grocery clerks, that demonstrators were to be paid clerks' wages, that this work was to be done by union members, and that the locals would maintain lists of persons available for demonstration work. <sup>3/</sup> At no time does it appear that Respondents, or any other locals of the International, approached any supplier, or pressed any store owner to approach any supplier, to become a party signatory to any sort of agreement relating to demonstrators. It became, and still is, the practice for the locals to maintain lists of persons who had done demonstrations or who were interested in doing them. Demonstrators so listed keep in communication with the local dispatcher concerning their availability. <sup>4/</sup> Suppliers or store owners would on occasion call the dispatcher concerning their need for the services of a demonstrator, although frequently when a demonstrator was known and previously had been used the communication would be made directly with her. <sup>5/</sup> In most, if not all instances suppliers functioning in both the Local 1288 and Local 839 areas used union sources

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<sup>3/</sup> Apparently this was the uniform position taken by all the locals including Local 1288 and Local 839. It is not shown just when such notifications were first given, or if they were given orally or in writing. No evidence was adduced to show that any store owner or supplier ever expressed opposition to the position taken, or indeed responded to the notification at all.

<sup>4/</sup> It is not clear if all the persons whose names were kept on these lists were union members. Some, and possibly all, were, however, and each of the demonstrators who testified at the hearing stated that she was a union member and made some use of the union dispatching facilities.

<sup>5/</sup> There is no indication that Nickel's or Mead's ever directly communicated with the union dispatching office concerning demonstrators. Insofar as this record shows it was the suppliers alone who communicated with the locals concerning demonstrators used at Nickel's and Mead's.

for obtaining demonstrators. In all instances such suppliers regularly paid the demonstrators used the wage scale for clerks which was set forth in the contracts between the store owners and the Respondents in their respective areas. <sup>6/</sup>

The relationship of the work done by contract clerks to that of demonstrators becomes of significance in evaluating the contract clauses to be set forth below, since, among other things, the General Counsel asserts that demonstrators' work "is entirely different from clerks' work . . . (and) the job qualifications are likewise different". This record does not sustain such an assertion.

The contract defines clerks' work as "all work and services connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the employer's retail food stores". Clerks regularly stock shelves, build displays, check out and bag groceries. Their sole function is to "sell" the products stocked using the term "sell" in its broadest sense. Each "handling" they may perform is but one phase of their overall function of moving the products from the storeroom to the final possession of the customer. Demonstrators work for the entire period of each demonstration alongside the clerks. While in the store a demonstrator is essentially engaged in promoting the sale of a particular product sold by the store in exactly the same sense that a clerk, on a broader scale, is engaged in the promotion of the sale of all the products. At the most, demonstrators engage in a specialized type of "handling" and selling a particular product in the store for a limited period of time. Although by virtue of their hiring some control remains vested in the

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<sup>6/</sup> The only demonstrators who testified that they had worked at Nickel's were members of Local 1288. There is a suggestion in the testimony of the suppliers in that area that in some cases non-union demonstrators had been used at Nickel's or elsewhere. It is not established, however, that at any time any demonstrator ever used was paid less than the prevailing union scale for clerks in the area. It stands undisputed that the suppliers in the Local 839 area used union members exclusively, and paid the union scale for clerks to demonstrators sent to Mead's and to other stores.

supplier, while the demonstrator is on the job at the store, of necessity she becomes subject to the immediate supervision and control of the store owner or manager just as do the clerks, a fact which the absence of any great need for any detailed supervision should not obscure. Training and skills required to be a demonstrator are minimal, and do not appear to differ in any particular from those required to be a clerk.<sup>7/</sup> The suppliers uniformly testified that they sought to employ demonstrators with pleasing personalities, nice appearances and the ability to communicate easily with the customers. It is difficult to conceive that a store owner would not seek exactly the same qualities in a clerk. In the past, clerks have done demonstrations and in some instances they still do them. It thus appears that the basic character of the work of clerks and demonstrators is the same, and that wholly apart from all other considerations which may influence the disposition of this case, the work of each must be regarded as bearing a close functional relationship to that of the other, and I so find.

C. The contract clauses and the bargaining history

As previously noted, Respondents presented demonstrator clauses to Nickel's and Mead's during the course of the 1964 contract negotiations. These were the same clauses which were accepted by the greater part of the Northern California grocery industry following the 1964 negotiations and are now to be found as a part of the 1964 industry contracts. They read in pertinent part as follows:

Section 1 - Recognition and Contract Coverage

(a) Recognition The Employer hereby recognizes the Union as the sole collective bargaining agency for an appropriate unit consisting of all employees working in the Employer's retail food stores within the geographical jurisdiction of the Union . . .

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<sup>7/</sup> There is evidence that demonstrators in some instances came from the ranks of clerks who no longer wished full-time work. Conversely, on occasions when demonstrators wish full-time work they may return to the ranks of clerks.

(b) Clerk's Work The work covered by this Agreement shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof and such work shall consist of all work and services connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employer's retail food stores including the demonstration of such products. . .

#### Section 8 - Classification of Employees

(f) Demonstrators All work connected with or incidental to the demonstration of merchandise offered for sale in the Employer's retail store (except merchandise referred to in Section 1(b) hereof as being excluded from this Agreement) shall be covered by this Agreement, and all such work shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof. No Demonstrator may perform such work in the Employer's retail store unless said Demonstrator is on the payroll of the Employer, party hereto or a licensee of said Employer, and unless the Employer at all times holds and exercises full control of the terms and conditions of employment of any such Demonstrators while such work is being performed in the Employer's retail store. Demonstrators shall be covered by all the terms of this Agreement. All employees classified as Demonstrators on April 1, 1964, shall be paid on the basis of the Regular Clerk's rate of pay.

It was stipulated that strikes and picketing were undertaken at both Nickel's and Mead's with an object of obtaining such clauses.

The parties agree that the following employees at Nickel's constitute an appropriate unit within the meaning of the Act: all retail food store employees at its stores located in the geographical jurisdiction of Respondent 1288, excluding meat department employees and supervisors as defined in the Act. It is not disputed that at all material times Local 1288 represented a majority of the employees in such unit, I find such unit to be appropriate and Local 1288 to have been the statutory representative at all material times.



As set forth above, with the advent of the current practice of having suppliers furnish the demonstrators, the locals promptly apprised store owners that demonstrators must come from union sources and must be paid at the union scale. When the store owners and suppliers acquiesced to such demands, contract revisions were not initially sought. In the 1955 contract, demonstrators were still not mentioned by name, but the unit was defined generally as "consisting of all employees working for the Employer within the jurisdiction of the Union" and the work of unit employees was more specifically defined as follows:

(b). All work and services (not defined as supervisory, under Section 2 (11) NLRA) connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employer's retail establishment shall be performed only by employees within the appropriate unit as defined in this agreement . . . .

The 1955 contract provisions resulted in no change from previous practices, and demonstrators continued to be selected by the suppliers, using union sources, and to be paid by the suppliers at the union scale.

In 1961, for the first time, demonstrators were mentioned by name in the new contracts negotiated with the store owners. The 1961 contracts continued to describe the unit and the work of the clerks in the same manner as had the 1955 contracts, but the following clause was added:

Demonstrators Demonstrators on the payroll of manufacturers or wholesale suppliers and not directly employed by the Employer shall be members of the collective bargaining unit provided by this agreement and shall be subject to the terms of this agreement governing employment of Union members, wage rates, hours and uniforms. The above provisions shall not apply to any demonstrators directly employed by the retail food store employers, parties hereto, and such demonstrators shall be covered by all the terms of this agreement.

Nickel's was a party to the 1961 industry agreement. There is no showing that it affected existing practices concerning the use of demonstrators at Nickel's, or any other stores in the industry in Northern California.

The 1964 clauses under attack in the instant case purport to expand the coverage of demonstrators in some respects. Respondents contend that they show no attempt to alter previous practices, but only seek to make more explicit recognized and accepted practices, and unequivocally to establish responsibility on the part of the store owners for seeing that demonstrators receive all contract benefits. There is no showing that acceptance of such clauses by the industry as a whole has had any effect whatsoever on existing industry practices, or resulted in a disruption of existing business relationships between the store owners and the suppliers.

#### D. Discussions of the Issues and Conclusions

The issue presented is a relatively narrow one. It is limited to the legality of the demonstrator clauses within the meaning of Section 8(e), since admittedly the Respondents' conduct had as an object securing such clauses. Thus if the clauses be unlawful, violations of Section 8(b)(4)(i), (ii)(A) on the part of both locals, and a violation of Section 8(b)(3) upon the part of Local 1288, are established.

Section 8(e) was enacted in 1959 to plug so-called loopholes in the existing secondary boycott provisions of the Act. It embodied part of a Congressional effort to limit the area of permissible action in labor disputes to the primary disputant, and to prevent neutrals having no direct interest in the primary controversy from becoming involved in it. Section 8(e) approached the matter by outlawing contracts designed to compel employers to cease doing business with others.<sup>8/</sup> The literal language

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<sup>8/</sup> Section 8(e) of the Act reads in pertinent part as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .



of the section would appear to proscribe all contracts whereby an employer agrees to "cease doing business with any other person". It developed, however, that such literal construction was viewed as inconsistent with the legislative history, and that agreements, even though they result in some measure of "cease doing business", will be permitted where their essential thrust is primary rather than secondary. Thus, it has been held that an employer may lawfully agree to refrain from contracting out any bargaining unit work because the primary purpose of such a clause is viewed as protecting unit work, even though such agreement may have the incidental effect of requiring the employer to cease doing business with other employers.<sup>9/</sup> On the other hand, however, clauses in an agreement designed to blacklist specified employers, or classes of employers, because their products or labor policies are objectionable to the contracting union are regarded as principally directed at limiting or disrupting business relationships with others, rather than conferring direct benefits and protecting unit employees, and hence they are deemed to be unlawful.<sup>10/</sup>

As specific clauses came up for scrutiny within these general criteria, various distinctions were spelled out. Thus cases have drawn a basic distinction between so-called "work preservation" and "work acquisition" clauses, and between so-called "union standards" and "union signatory" clauses. Where the basic objective of the clause appears as protection and preservation of the work of the contract unit, or as protection of the wages and working conditions of unit employees by limiting

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9/ Service and Maintenance Employees Union, Local No. 399, AFL-CIO (Superior Souvenir Book Company), 148 NLRB 1033; Ohio Valley Carpenters District Council (Cardinal Industries), 136 NLRB 977; Milk Drivers Union Local No. 753 (Pure Milk Association), 141 NLRB 1237.

10/ District 9 IAM v. N.L.R.B., 315 F. 2d 33, 51 LNRM 2496 (C.A.D.C.); NLRB v. Joint Council of Teamsters No. 38, 338 F.2d 23, 57 LNRM 2422 (C.A.9).

subcontracting to employers maintaining similar standards, the clauses are regarded as lawful. <sup>11/</sup> On the other hand, if the principal objective of the clause is to seek work for unit employees which has been customarily performed by employees of other employers, or if the clause is aimed at requiring an employer to do business solely with other employers who are signatory to the union contract, then its thrust is deemed to be secondary and aimed at limiting the number of employers with whom an employer can do business, or at disrupting existing business relationships, and it is deemed unlawful. <sup>12/</sup> These distinctions are expressed with particular clarity in two cases. In one Orange Belt District Council v. N.L.R.B., supra, the court stated:

The key question presented by subcontracting clauses in union agreements with general contractors is whether they are addressed to the labor relations of the subcontractor, rather than the general contractor. If so, they are secondary as to the general contractor and may not be enforced against him through economic weapons. Thus, any attempt to enforce by economic means a subcontracting clause which blacklists all non-subcontractors would violate Section 8(b)(4)(ii)(B). But not all subcontracting

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<sup>11/</sup> Meat and Highway Drivers Local 710 v. N.L.R.B. (Wilson and Co.), 335 F.2d 709, 56 LRRM 257 (C.A.D.C.); Truck Drivers Local 413 v. N.L.R.B. (Brown Transport and Patton Warehouse Co.), 334 F.2d 539, 55 LRRM 2878 (C.A.D.C.); Orange Belt District Council of Painters No. 48 v. N.L.R.B., 328 F.2d 534, 55 LRRM 2293 (C.A.D.C.).

<sup>12/</sup> N.L.R.B. v. Joint Council of Teamsters No. 38 (Arden Farms Co.), 338 F.2d 23, 57 LRRM 2422 (C.A. 9); Meat and Highway Drivers Local No. 710 v. N.L.R.B., supra; Truck Drivers Local 413 v. N.L.R.B., supra.

clauses are so designed. The test as to the "primary" nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as whether it "will directly benefit the employees covered thereby", and "seeks to protect the wages and job opportunities of the employees covered by the contract". We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit", and seek "to protect and preserve the work and standards (the union) has bargained for", or instead "extend beyond the (contracting) employer and are aimed really at the Union's difference with another employer".

In Meat and Highway Drivers Local 710 v. N.L.R.B., supra, the same court stated the issue as follows:

Resolution of the difficult issue of primary versus secondary activity, as it relates to this case, involves consideration of two factors; (1) jobs fairly claimable by the bargaining unit, and (2) preservation of those jobs for the bargaining unit. If the jobs are fairly claimable by the unit, they may, without violating either Section 8(e) or Section 8(b)(4) (A) or (B), be protected by provision for and implementation of, no subcontracting or union standards clauses in the bargaining agreements.

Activity and agreement which directly protect fairly claimable jobs are primary under the Act. Incidental secondary effects of such activity and agreements do not render them illegal. Thus the "cease doing business" language in Section 8(e) cannot be read literally because inherent in all subcontracting clauses, even though admittedly primary is refusal to deal with at least some contractors.

In applying the foregoing standards to the instant case, three factors must be considered: (1) what is the relationship of demonstrators' work to that of clerks in the unit; (2) what is the scope and thrust of the contract language; and (3) what is the past history of the relationship between the locals, the store owners, and the suppliers. Either one of these factors standing alone, or the three as they interrelate, should be dispositive of the issues which confront us.

If the work of demonstrators were to be found so unrelated to that of clerks that insufficient functional cohesiveness were present to warrant placing them together in a single unit, the clauses could scarcely be regarded as aimed at unit work preservation, and the General Counsel's position could be sustained on this ground alone without regard to the text of the clauses or to the past history of the relationship between the parties. I have already found the character of the work of demonstrators and clerks to be functionally related. Thus, absent other considerations, justification would exist for placing them in the same bargaining unit. It does not follow, however, that functional relationship alone will suffice to establish that the objective of the clause is unit preservation. Clauses aimed at making a secondary employer a signatory to a contract, or at drawing into the unit employees of other employers may be found unlawful in spite of a high degree of functional cohesiveness.<sup>13/</sup>

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<sup>13/</sup> Illustrative of this point is the recent Board case, Retail Clerks Union No. 1428, 155 NLRB No. 74. The Board found an 8(e) violation, although the work done by employees of the rack jobbers unquestionably had a close functional relationship to that of the clerks in the grocery stores. The Board found it unnecessary to decide if the work was fairly claimable as unit work, since it found that the contract required "rack jobbers", as a condition of continued performance of their-in-the store services, to take steps culminating in both recognition of Respondent Unions and commitment to Respondents' agreement. The Board held that such a provision extended beyond the unit preservation "of work or standards bargained for the principal unit" and bore "all of the vices of  
(continued on page 150)

The language of the demonstrator clauses in the instant case does not require suppliers to become signatories to a separate agreement with the locals, or to become committed to abide by the store owners' union agreements as a condition to performing services in the stores. The recognition clause defines clerks' work as "all work and services connected with or incidental to the handling or selling of merchandise" in the store, and requires that all work must be done by "employees working" in the store. It expressly designates demonstrators as within the scope of such description, and requires that demonstrators' work be performed by "members of the appropriate unit". The language itself describes the work in unit terms, and requires that demonstrators be carried either on the store owners' payroll or on that of a "licensee". <sup>14/</sup>

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<sup>13/</sup> the so-called union signatory clauses". In addition the Board found that there was not only a long-established business relationship between the rack jobbers, but also that the employees of the latter, were in many instances, represented by another labor organization. Under such circumstances, the Board regarded the thrust of the clauses as secondary, and aimed at disrupting existing relationships rather than at a preservation of unit work.

<sup>14/</sup> Some difference exists among the parties as to the meaning of the term "licensee". Respondents claim it has the ordinary broad meaning of any person who has permission or authority to enter the premises of another. The General Counsel and the charging parties would restrict its meaning, contending that representations made during the negotiations indicate the term to be applicable solely to concessionaires or lessees, and that this would not include the suppliers. The attorney for the charging parties testified that during the course of the negotiations he had inquired concerning the meaning of the term, and had been told by Respondents that it meant "a person with whom a retail store operator had a contractual relationship". He states that "a lessee or concessionaire within the store" was given him as an example of a licensee. I do not see that such representation of example necessarily excludes suppliers from a definition of the term. In its broader sense, the term "licensee" does not even require the existence of a contractual relationship. It is abundantly clear, however, that the store owners and suppliers have contractual relationships albeit informal ones. All demonstrations take place following a mutual understanding between the two concerning the terms of an arrangement which is undertaken for the mutual benefit of each. This is certainly contractual in nature. Moreover, the basic position of the General Counsel rests on his claim that the demonstrator clauses are unlawful because they involve unit acquisition. Even if the asserted misunderstanding exists, I fail to see that it either adds to or detracts from such claim.



However, regardless of any unit or payroll terms used, the primary thrust of the clauses is directed at insuring that demonstrators, while working in the store, will work under the same union contract standards as the clerks. Thus we find the proviso that "at all times the (store owner) holds an exercises full control of the terms and conditions of any such demonstrations while such work is being performed" in the store. It stands undisputed that Respondents regard with indifference the issue of who hires or pays the demonstrators, so long as the ultimate responsibility of meeting union contract standards rests with the store owner with whom the local has the contract.

To resolve the issues before us it is not essential to determine if the demonstrator clauses literally place demonstrators within the unit. Whether or not they do, the clauses clearly undertake to subject demonstrators to contract conditions while working at the stores, and to fix responsibility in the store owners alone for assuring that all demonstrators receive such contract conditions regardless of who hires or pays them. It is the position of the General Counsel that this can only be construed as unit acquisition since the record shows that all demonstrators used at Nickel's and Mead's were hired and paid by suppliers. This fact alone the General Counsel deems controlling, and I gather he would consider a contract violative of Section 8(e) whether it placed the demonstrators literally within the unit or only gave the store owners limited control over their working conditions. This would be premised on the theory that in either case we have a form of unit acquisition, with the inevitable effect of disrupting, in some measure, established supplier-employee relations and affecting the long standing business relationship between the suppliers and the store owner.

The General Counsel's contention has a persuasive ring if it be considered in isolation from past practice and bargaining history. The issue, however, does not arise in a vacuum. On the contrary, it comes up against a background of demonstrator practices in an industry of which Nickel's and Mead's are an integral part. While it is true that



neither Nickel's nor Mead's has a history of using its own clerks in demonstrations, it is not claimed that clerks and demonstrators function differently in these two stores from the manner in which they do in the rest of the industry. The industry history, including that in the areas where Local 1288 and Local 839 function, shows a concern by the locals over the status of demonstrators at all times. When the locals first were confronted with the current practice of having suppliers hire and pay for demonstrators, they immediately asserted that demonstrators were doing clerks' work, and they demanded that demonstrators be hired through union sources and paid the clerks' scale. From the outset the locals took demonstrators into membership and kept lists of persons available for hire for this type of work. In most instances demonstrators were hired through these union sources and have been union members.<sup>15/</sup> There is no evidence that at any time demonstrators have ever been paid at other than at the union contract scale for clerks. At no time did the locals either directly or indirectly press the suppliers to become signatories to any agreement binding them to the store owners' contracts. There is nothing to show that suppliers ever resisted either using union sources or paying clerks' scale. All pressures exerted were directed at the store owners who at no time contended that demonstrators were not doing clerks' work, or in the past resisted the demands of the Respondents. The locals initially sought no contract provision covering the relationship of the demonstrators to store owners, presumably because the apparent acquiescence of store owners in their demand and the continuing practice of the suppliers in hiring from union sources and paying union scale, satisfied their claim that demonstrators were doing clerks' work, and should be employed at contract standards. In 1961, however, the locals

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<sup>15/</sup> As noted above, there is some evidence that in the Local 1288 area demonstrators who were not union members may have been used. There is nothing to show how extensive this practice was, however, and insofar as it occurred, it took place without protest by the local.

sought a contract provision making explicit what was by then a long standing practice, and for the first time they sought, and obtained without opposition, clauses reciting that demonstrators were to receive the benefits of union contract standards even though not on the payrolls of the store owners. Nickel's among many others, accepted this provision without protest. There is no showing that it affected any existing relationship between Nickel's or any other employer in the industry. On the contrary, practices relating to demonstrations continued exactly as they had in the past. I note no substantial difference in objective between the 1961 and the 1964 clauses. The 1964 demonstrator clauses seek only to make even more specific the locals' aim to insure continuance of the long established practice.

Teamsters Local 710 v. N.L.R.B. (Wilson and Co.), supra, is a case directly in point. For 20 years, Teamsters had had an agreement with meat packers in the Chicago area providing that unit employees should deliver meat packed in the Chicago plants to customers within the Chicago area. The meat packers relocated their plants outside the Chicago area, and indeed outside the State of Illinois. Out of state shipments into the Chicago area had theretofore been regarded as outside the scope of Teamsters' contract, and were usually undertaken by over-the-road drivers not subject to the contract. Upon relocating the plants, the meat packers began to use these over-the-road drivers to make deliveries to customers in the Chicago area which formerly had been serviced by unit employees when the plants were located there. The effect, of course, was sharply to reduce employment of Teamsters' drivers. To offset this Teamsters proposed contract clauses designed to recover the jobs lost by the new mode of delivery. The Board held that since out-of-state shipments had not been historically handled by Teamsters, the effort of Teamsters to recover the work was in the nature of unit work acquisition, and not unit work preservation, and was therefore unlawful. The Court of Appeals for the District of Columbia reversed the Board, commenting in the manner quoted above, and also stated:

Applying these principles to the work allocation clause here, we find that delivery in the Chicago area, irrespective of origin of the shipment, is work fairly claimable by the union. It has been said "that a union has always been free to bargain for the expansion of employment opportunities within the bargaining unit". Comment, 62 Mich. Law Review 1176, 1190 (1964). The work here claimed is of a type which the men in the bargaining unit have the skills and experience to do. It would be difficult to deny that '(a) clause covering non-traditional work' may be just as consecrated to the primary objective of bettering the lot of the bargaining unit employees and just as foreign to the Congressional purpose of Section 8(e) as those clauses involving only the work traditionally done within the bargaining unit'. Id. at 1189.

Moreover, in the case before us, we have not work acquisition but work recapture. It is true, as the Board finds, that in the past out of state shipments have on occasion been delivered to consignees in the Chicago area by the interstate carrier directly, in spite of the fact that the expiring bargaining agreement with the employers here covered deliveries "to a distance not exceeding fifty miles from the Chicago stock Yards . . ." But when the expiring agreement was originally entered into, practically all of the packing houses from which deliveries to the Chicago area were made were located in Chicago. Consequently the union had no concern with the occasional shipment into the area via interstate carrier.

The General Counsel would distinguish the above case on the ground that clerks at Nickel's and Mead's had never done demonstrations, that demonstrations at these stores were always carried on by employees on the payroll of the suppliers, and that thus there could be no "work recapture". I do not construe the rationale to rest on so narrow a base. The tests enunciated are "fairly claimable" and "preservation of those jobs for the bargaining unit". Demonstrators' jobs are not only fairly claimable functionally, but historically we find the locals claiming the jobs to be subject to contract standards, and both the suppliers and the store owners acquiescing in the claim to the extent of using the locals as a source of supply and paying demonstrators the contract clerks' scale. Until the instant case these continuing claims of the Locals had not been challenged. The demonstrator clauses may not be considered a "recapture" of demonstrators' jobs in a literal sense since at Nickel's and Mead's demonstrations have never been done by unit clerks, but the locals have never abandoned their assertion that demonstrations were unit work. Thus their efforts appear to be directly related to "preserving" jobs that they deemed they had never lost. In a sense such a unit preservation claim rests on a base even stronger than the "recapture" claim in the quoted case, and surely it is not in any way inconsistent with the "fairly claimable" rationale set forth. Accordingly I find the demonstrators clauses to be primarily designed for the lawful objective of unit preservation.<sup>16/</sup>

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<sup>16/</sup> I regard the instant case as clearly distinguishable from the recent Board case Retail Clerks Union Local No. 1428, *supra*, which involved rack jobbers in the grocery industry in Southern California. As already noted in footnote 13 above, the Board in that case found the clauses presented to have secondary thrust and attempts to obtain them to be unlawful. The Board pointed out that although it is now well settled that provisions in collective bargaining agreements merely allocating fairly claimable work to unit employees are lawful, the vice in the rack jobbers case is to be found in the effort by the union to prohibit employees from performing services in the stores "unless the rack jobbers recognize and

(Continue on page 156)

Respondents contend in the alternative that demonstrators have at all times been employees of the store owners and part of the same bargaining unit as the clerks. Thus, it is argued that efforts directed at establishing their status in a unit of which they are already a part are proper. The General Counsel would refute this contention by claiming that demonstrators are hired and paid by the suppliers, and thus are employees of the suppliers alone, and consequently not a part of a unit comprised of employees of the store owners. Respondents argue, however, that hiring and payment alone do not suffice to define the employment relationship, but that the basic test rests in effective control. Thus they point out that during the time that demonstrators are at a store they are subject to the direct supervision and control of the store owners. The fact that demonstrators are subject to the direction and control of store owners tends to establish not only a close relationship between demonstrators and clerks, but also to some extent signifies that store owners and suppliers may be regarded as joint employers. I question the advisability of reaching such conclusion in this case, however. The instances in which the Board has found sufficient indicia of joint control over significant aspects of the employment relationship to support a finding of joint employment have usually arisen when it was determining a question

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<sup>16/</sup> become bound to the observance of" the agreement. This was regarded as a "union signatory" type of clause secondary in its objective. It was also pointed out that in many instances employees of the rack jobbers were represented by another union, and that the store owners and rack jobbers had jointly resisted the union proposals as essentially an effort to disrupt established business relationships. In the instant case we find the store owners and the suppliers jointly accepting the practice of having demonstrators coming from union sources and receiving union contract scale, no representation of demonstrators by another union, and no efforts by the locals to integrate the suppliers in the store owners' unit. On the contrary all the efforts of the locals appear directly related to a primary effort aimed at insuring that union standards will not be undermined by permitting persons to do related work side by side with the clerks at less than contract standards.



concerning representation. Principal concerns in a representation proceeding relate to unit descriptions, and a determination of who has the duty to bargain. The controversy here does not arise in such a context. There has been no effort to make suppliers joint employers or to establish a duty to bargain on their part. Precise unit placement is not an issue which has been litigated or even raised by the pleadings. The sole issue centers on whether the circumstances show the purpose of the demonstrator clauses to be primarily directed at unit protection or if unit acquisition or disruption of established relationship is the underlying object. I have found that the nature of the work, the character of the clauses, and the historical development considered together signify that the demonstrator clauses may properly be regarded as aimed at preserving unit work. This is sufficient ground to be dispositive of the issues presented. Issues of unit placement based on the employment relationship of demonstrators and store owners are best reserved for a separate proceeding if they be deemed of importance. Accordingly, I limit the scope of my findings to holding that under all the circumstances demonstrators are fairly claimable as unit employees, and that in view of this fact the clauses demanded are not violative of Section 8(e) of the Act.

Since the demonstrator clauses are not violative of Section 8(e), it follows that the strikes and picketing in furtherance of obtaining them do not have an unlawful object, and that therefore Respondents have not violated Section 8(b)(3) or Section 8(b)(4)(i)(ii) of the Act. Accordingly I shall recommend that the complaint be dismissed.



Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

**Conclusions of Law**

1. Nickel's Payless Stores of Tulare County, Incorporated, and James Mead and Roger Mead Co-partners d/b/a Mead's Market, are each employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. Retail Clerks International Association, Retail Clerks International Association Local Union No. 1288, AFL-CIO, and Retail Clerks International Association Local Union No. 839, AFL-CIO, are each labor organizations within the meaning of Section 2(5) of the Act.
3. Respondent Local 1288 and Respondent Local 839 have not engaged in unfair labor practices as alleged in the complaint.

**RECOMMENDED ORDER**

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is hereby recommended that the complaint be dismissed in its entirety.

Dated: March 11, 1966

/s/

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Louis S. Penfield  
Trial Examiner

163 NLRB No. 112

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DECISION AND ORDER

On March 11, 1966, Trial Examiner Louis S. Penfield issued his Decision in the above-entitled proceeding, finding that Respondents had not engaged in the unfair labor practices alleged and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Decision, and the General Counsel and Mead's Market filed supporting briefs.<sup>1/</sup> Respondents and Intervenor Retail Clerks International Association <sup>2/</sup> filed a reply brief.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent with this Decision and Order.

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<sup>1/</sup> Subsequent to the issuance of the Trial Examiner's Decision, Nickel's moved for allowance to withdraw the charges in Cases Nos. 20-CB-1327 and 20-CC-481. The General Counsel opposed the motion, noting that Nickel's had signed a contract including the clauses at issue herein.

Once a charge is filed the General Counsel proceeds, not in the vindication of private rights, but as the representative of an agency entrusted with the enforcement of public law and the assertion of the public interest therein. United Mechanics' Union Local 150-F (American Photocopy Equipment Company), 151 NLRB 386; New York Central Transport Company, 141 NLRB 1144. When a matter has ripened to the point of being before the Board for decision, we must of course give paramount weight to the public interest affected by withdrawal of the underlying charge. As any alleged illegality present in the clauses proposed by Respondents would not be cured by Nickel's consent, we hereby deny the motion.

<sup>2/</sup> Retail Clerks International Association was granted permission to intervene at the hearing.

The consolidated complaint herein alleges that Respondent Local 1288 violated Section 8(b)(4)(i)(ii)(A) and Section 8(b)(3) of the National Labor Relations Act, as amended, and that Respondent Local 839 violated Section 8(b)(4)(i)(ii)(A). Both Respondents admitted that they struck and picketed the Charging Parties with an object of obtaining certain "demonstrator clauses" in collective bargaining agreements with those employers. Consequently, the issue presented by this case is whether the demonstrator clauses are prohibited by Section 8(e) of the Act.

Nickel's and Mead's, the Charging Parties herein, operate retail grocery markets in northern California. The stores involved are all of the self-service variety, with clerks performing such duties as stocking shelves, marking prices, and checking out groceries. For a number of years, many of the suppliers and producers of products sold at Nickel's and Mead's have conducted demonstrations for those stores' customers. These demonstrations consist of the distribution of free samples along with a few words about the virtues of the merchandise. The demonstrations serve both to stimulate sales of the particular products demonstrated and to increase the business of the stores in general. They are conducted by women, known as demonstrators, who are hired by and carried on the payrolls of the suppliers.

For approximately 15 years Nickel's employees had been represented in collective bargaining by Respondent Local 1288. Upon the expiration of its last contract in 1964, Nickel's withdrew from the employer association to which it belonged and began to bargain individually with that Local.

Mead's employees are represented by Respondent Local 839, pursuant to a bargaining order issued by the Board in 1964,<sup>3/</sup> but Mead's has never been a party to any collective-bargaining agreement with a labor organization.

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<sup>3/</sup> James A. Mead and Roger Mead, co-partners d/b/a Mead's Market,  
148 NLRB 383.

During the 1964 contract negotiations, Respondent Locals 1288 and 839 sought to have Nickel's and Mead's, respectively, agree to clauses which would make the demonstrators subject to the contracts between the stores and the Unions. These demonstrator clauses had been incorporated in the Master Contract for northern California that covered most of the grocery stores in the region. When Nickel's and Mead's refused to agree to the clauses, their stores were struck and picketed with an object of forcing such agreement.

The disputed demonstrator clauses read as follows:

Section 1 - Recognition and Contract Coverage

- (a) Recognition. The Employer hereby recognizes the Union as the sole collective-bargaining agency for an appropriate unit consisting of all employees working in the Employer's retail food stores within the geographical jurisdiction of the Union...
- (b) Clerk's Work. The work covered by this agreement shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof and such work shall consist of all work and services connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employer's retail food stores including the demonstration of such products...

Section 8 - Classification of Employees

- (f) Demonstrators. All work connected with or incidental to the demonstration of merchandise offered for sale in the Employer's retail store (except merchandise referred to in Section 1(b) hereof as being excluded from this agreement) shall be covered by this agreement, and all such work shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof. No demonstrator may perform such work in the Employer's retail store unless said demonstrator is on the payroll of the Employer, party hereto or a licensee

of said Employer, and unless the Employer at all times holds and exercises full control of the terms and conditions of employment of any such demonstrators while such work is being performed in the Employer's retail store. Demonstrators shall be covered by all the terms of this agreement. All employees classified as demonstrators on April 1, 1964, shall be paid on the basis of the regular clerk's rate of pay.

The clauses, especially Sections 1(a) and (b) and the first sentence of Section 8(f), purport to restrict the performance of demonstrators to members of the unit of grocery store employees. The clauses further specify that the stores shall have full control of the terms and conditions of employment of the demonstrators and that the demonstrators shall be covered by all the terms of the collective-bargaining agreements between the Unions and the stores. Despite these provisions, which would seem to limit demonstrators' work to employees of the grocery stores, the clauses allow demonstrators to remain on the payroll of "licensees", i.e., suppliers. Under this latter provision, demonstrations would be conducted much as they had been previously, except that the demonstrators would be covered by the contract.

The Trial Examiner, after reviewing practices in the northern California area, concluded that the work of demonstrators and clerks was "functionally related" and that demonstrations had been performed by clerks in many stores before the Second World War. Since the Unions had consistently, and with some success, claimed over the succeeding years that demonstrators were subject to contract standards, he decided that the clauses served the lawful primary purpose of preserving jobs which the Unions deemed they had never lost. Thus, deciding that demonstrators were fairly claimable as unit employees, he recommended dismissal of the complaint. The General Counsel contends that the clauses violate Section 8(e) of the Act because they will force the stores to cease doing business with any supplier who does not apply contract

conditions to his demonstrators. He further argues that Respondents can have no legitimate claim to demonstrators' work, because it is not similar to clerks' work and thus cannot be considered work which is "fairly claimable"<sup>4/</sup> by the unit. Respondents, on the other hand, claim that demonstrators are, and always have been, employees of the stores and are thus properly included in the bargaining unit and subject to the contract. They also contend that the work of demonstrators is so similar to clerks' work that the clauses are needed to protect the integrity of the bargaining unit.

It is well settled that contract clauses which restrict the performance of unit work, or at least fairly claimable unit work, to unit members in the employ of the contracting employer are not violative of Section 8(e).<sup>5/</sup> Such provisions "seek to protect the wages and job opportunities of the employees covered by the contract" and are "germane to the economic integrity of the principal work unit".<sup>6/</sup> These clauses are considered primary even though they may have the incidental effect of causing the employer to cease doing business with other persons. The same is true of clauses which allow the employer to subcontract unit work only to other employers who maintain minimum union

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<sup>4/</sup> "Activity and agreement which directly protect fairly claimable jobs are primary under the Act." Teamsters Local 710 v. N.L.R.B. (Wilson & Co), 335 F. 2d 709 (C.A. D.C. 1964).

<sup>5/</sup> Service and Maintenance Employees' Union No. 399 (Superior Souvenir Book Company), 148 NLRB 1033; Milk Wagon Drivers and Dairy Employees Union Local 603 (Drive-Thru Dairy, Inc.), 145 NLRB 445; Milk Drivers' Union, Local 753 (Pure Milk Association), 141 NLRB 1237, enf'd 335 F. 2d 326 (C.A. 7, 1964); Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America (Cardinal Industries, Inc.), 136 NLRB 977.

<sup>6/</sup> Orange Belt District Council of Painters No. 48, AFL-CIO v. N.L.R.B. (Calhoun Drywall Co.), 328 F. 2d 534 (C.A. D.C., 1964).



of said Employer, and unless the Employer at all times holds and exercises full control of the terms and conditions of employment of any such demonstrators while such work is being performed in the Employer's retail store. Demonstrators shall be covered by all the terms of this agreement. All employees classified as demonstrators on April 1, 1964, shall be paid on the basis of the regular clerk's rate of pay.

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conditions to his demonstrators. He further argues that Respondents can have no legitimate claim to demonstrators' work, because it is not similar to clerks' work and thus cannot be considered work which is "fairly claimable"<sup>4/</sup> by the unit. Respondents, on the other hand, claim that demonstrators are, and always have been, employees of the stores and are thus properly included in the bargaining unit and subject to the contract. They also contend that the work of demonstrators is so similar to clerks' work that the clauses are needed to protect the integrity of the bargaining unit.

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<sup>5/</sup> Service and Maintenance Employees' Union No. 399 (Superior Souvenir Book Company), 148 NLRB 1033; Milk Wagon Drivers and Dairy Employees Union Local 603 (Drive-Thru Dairy, Inc.), 145 NLRB 445; Milk Drivers' Union, Local 753 (Pure Milk Association), 141 NLRB 1237, enf'd 335 F. 2d 326 (C.A. 7, 1964); Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America (Cardinal Industries, Inc.), 136 NLRB 977.

<sup>6/</sup> Orange Belt District Council of Painters No. 48, AFL-CIO v. N.L.R.B. (Calhoun Drywall Co.), 328 F. 2d 534 (C.A. D.C., 1964).

standards.<sup>7/</sup> On the other hand, contract provisions are secondary and unlawful if they are to have as their principal objective the regulation of the labor policies of other employers and not the protection of the unit.<sup>8/</sup> Typical of such proscribed provisions are those which limit subcontracting to employers who recognize the union or who are signatory to a contract with it.

Although the Trial Examiner found it unnecessary to decide whether demonstrators are employees of the suppliers, the stores, or both, we believe that this is the central issue of the case. If the demonstrators are actually employees of the stores and members of the bargaining units represented by Respondents, the demonstrator clauses would serve the primary function of protecting unit work. On the other hand, if they are employees of the suppliers, and outside the units, the clauses would be unlawful, for, even if the work in question could be regarded as fairly claimable unit work, the clauses go beyond the legitimate purpose of restricting the contracting out of such work to suppliers who observe minimum standards and require that all the terms of the stores' contracts, including the union-security provisions, be applied to the demonstrators. By thus subjecting the employees of another employer to the contracts, they would be similar in effect to union signatory clauses. We need not, therefore, decide whether demonstrators' work is fairly claimable by the unit, for even if it is, Section 8(e) would not permit Respondents to regulate the terms of employment and working conditions of employees of another employer, who are not in fact properly part of the bargaining unit.

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<sup>7/</sup> Wilson & Co., supra; Truck Drivers Union Local 413, v. N.L.R.B. (Patton Warehouse, Inc. and Brown Transport Corp.), 334 F. 2d 539 (C.A. D.C., 1964) cert. denied 379 U.S. 916; Calhoun Drywall Co., supra; Highway Truck Drivers and Helpers, Local 107 (S. & E. McCormick, Inc.), 159 NLRB No. 1.

<sup>8/</sup> N.L.R.B. v. Joint Council of Teamsters No. 38 (Arden Farms Co.), 338 F. 2d 23 (C.A. 9, 1964); Wilson & Co., supra; Patton Warehouse, Inc., supra; Retail Clerks Union Local No. 1428 (Food Employer's Council, Inc.), 155 NLRB 656.

Turning to the facts of the case, we cannot accept Respondents' argument that the status of demonstrators has always been and continues to be that of employees of Nickel's and Mead's while performing work in their stores. In deciding this issue we must look to the practices of the particular Charging Parties, and not--as Respondents and the Trial Examiner would have us do--to practices prevailing elsewhere in northern California. Even if there is a basis for finding that demonstrators at some of the stores in the area are the employees of those stores, no such finding can be made about demonstrators used at Nickel's and Mead's.

As noted above, the suppliers hire and pay the demonstrators. Often a supplier regularly uses the same woman or women to conduct demonstrations at various stores. But the work of a given demonstrator at a particular store is of brief duration; if she returns at all it will be at sporadic intervals. All of the equipment necessary for the demonstrations is provided by the suppliers, who generally help the demonstrators set it up at the stores. The suppliers give the demonstrators their instructions and check during the day to see if all is going well. Neither Charging Party gives any instructions to the demonstrators, except, perhaps, as to where she should set up her equipment; generally, however, this is determined by agreement between the store and the supplier. While the demonstration is progressing, little, if any, supervision is necessary. Whatever control over them is exercised by the stores is, we are satisfied, de minimis and merely an incident of the fact that they are performing their duties on the store premises. The Trial Examiner found that clerks at Nickel's and Mead's have never performed demonstrations; and it is clear from the record that demonstrators at the two stores have never engaged in regular clerks' work while conducting a demonstration. On these facts, in making an appropriate unit determination in a representation proceeding, we would not find demonstrators on the payroll of the suppliers to be includable in a unit of store employees. From the above, we conclude that demonstrators

working at Nickel's and Mead's are employees of the suppliers rather than of the stores,<sup>9/</sup> and not part of the collective-bargaining units herein involved.

The provision of the demonstrator clauses here in question giving the stores "full control of the terms and conditions of employment" does not serve to limit the work to employees of the stores. The clauses still permit demonstrators to remain on the suppliers' payrolls and subject to their control. Thus, they are distinguishable from the clauses found legal in S. & E. McCormick, supra, which not only clearly made the owner-operators and drivers of leased equipment there involved employees of the contracting employer while the work was being performed, but also subjected them to the full control of the carriers both with respect to the result to be achieved and the manner and means by which the work was to be performed. Moreover, the work to be performed by those whom the McCormick clauses added to the bargaining unit was identical in all substantial respects to that of other employees in that unit. In addition, as we noted in footnote 17 of that Decision, owner-operators and drivers of leased equipment have generally been considered to be employees of the lessee contracting employer, even without the clauses in dispute there.

There is no indication in the instant case that the relationship between the stores and the demonstrators would change pursuant to the full control provision. In fact, Respondents' witness, Claude Jinkerson, who served on a committee for the Northern California Retail Food Clerks Locals during the 1964 collective-bargaining negotiations, stated that the clauses were designed to clarify the previous contract. The Trial Examiner found that the 1964 clauses sought only to make previous

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<sup>9/</sup> See Burrows & Sanborn, Inc., 81 NLRB 1308, where the Board found cosmetic demonstrators to be employees of the store in which they worked. There, however, the store furnished part of the demonstrators' compensation and paid them their salaries, hired them, exercised complete control over them and had the right to discharge demonstrators without prior approval of the suppliers. Further, demonstrators were subject to store regulations and other employees had on occasion performed the same work.



practices more specific. Thus, whatever controls might be exercised by the stores over the demonstrators under the contract would continue to be slight compared to the suppliers. Demonstrators would still be the suppliers' employees and subject to their actual control.

The effect of the demonstrator clauses, then, would be to subject the suppliers to all the terms of contracts to which they were not parties. Only suppliers who observed contract conditions, including the union-security provisions, would be permitted to send demonstrators to Nickel's and Mead's. The clauses do not seek to retain or secure work for unit employees, for, no less than before, they permit the practice of having demonstrators' work performed by suppliers' employees, who, as found above, are not in fact part of the bargaining unit. Nor can they be deemed otherwise to serve the legitimate purpose of protecting the wages and working conditions of unit employees, for they go beyond the requirement of restricting the work to employers who maintain minimum union standards and require that all the provisions of the stores' contracts with the unions be observed, including union security and health and welfare provisions. Rather than being designed to aid unit employees, the clauses, we find, are aimed at assisting union members in general, a purpose not permitted by Section 8(e).<sup>10/</sup>

The demonstrator clauses are similar to those found illegal in Retail Clerks Union Local No. 1428 (Food Employer's Council), supra. In that case the disputed clauses sought to subject the employees of rack jobbers to the stores' contract with the unions by having the rack jobbers execute certain "concessionaire agreements" with the stores. These "concessionaire agreements" obligated the rack jobbers to abide by the wages, hours, and conditions of employment set forth in the collective-bargaining agreement. We found that such provisions bore "all the vices of the so-called 'union-signatory clauses' " and stated that it was unimportant that they did not, in terms, restrict the employers' business dealings to persons who signed the agreement--" . . .

<sup>10/</sup> Orange Belt District Council of Painters No. 48 (Calhoun Drywall Company), 153 NLRB 1196, enf'd 365 F. 2d 540 (C.A. D.C., 1966).



it being clear that the rack jobbers are prohibited from performing services in the stores unless they recognize and become bound to the observance of that agreement, the secondary thrust of Article I is identical to that involved in the typical 'union-signatory clause' ". Despite the absence of a "concessionaire agreement" in the instant case, the effect of the demonstrator clauses is much the same--no supplier may have his employees perform demonstrations in the stores unless he observes the agreement between Respondents and the stores.

Accordingly, we find, contrary to the Trial Examiner, that the demonstrator clauses are designed, not to protect or to preserve the jobs and working conditions of employees in the unit, but to control the employment practices of other employers who would do business with the Charging Parties, and to aid union members generally. We therefore find that the clauses would violate Section 8(e), that Respondents' attempts to get Nickel's and Mead's to agree to them violated Section 8(b)(4)(i)(ii)(A), and that Local 1288's insistence on the clauses as a condition to agreement violated Section 8(b)(3).

#### The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents set forth above have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

#### The Remedy

Having found that Respondents have engaged in unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

#### Conclusions of Law

1. Each of Respondent Unions is a labor organization within the meaning of Section 2(5) of the Act.

2. Nickel's Pay-Less Stores of Tulare County, Inc., and Mead's Market are each employers within the meaning of Section 2(2) of the Act and each is engaged in commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act.

3. By engaging in strikes and picketing with an object of forcing or requiring Nickel's and Mead's to enter into agreements containing clauses prohibited by Section 8(e) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(A) of the Act.

4. By conditioning the signing of a collective-bargaining agreement upon acceptance in such agreement by Nickel's of terms and conditions prohibited by Section 8(e) of the Act, Respondent Local 1288 has engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Retail Clerks International Association, Local Union No. 1288, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by Nickel's Pay-Less Stores of Tulare County, Inc., to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining Nickel's by picketing, or threatening to cause a work stoppage, or causing a work stoppage, or otherwise, where in either case an object thereof is to force or require Nickel's Pay-Less Stores

of Tulare County, Inc., to enter into any contract or agreement, express or implied, prohibited by Section 8(e) of the Act.

(b) Refusing to bargain by conditioning execution of a collective-bargaining agreement with Nickel's Pay-Less Stores of Tulare County, Inc., upon acceptance by Nickel's of terms and conditions which are unlawful.

2. Take the following affirmative action which the board finds will effectuate the purposes of the Act:

(a) Notify Nickel's that it will not insist upon inclusion of the demonstrator clauses in any collective-bargaining agreement.

(b) Post in conspicuous places in its business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix A".<sup>11/</sup> Copies of said notice, to be furnished by the Regional Director for Region 20, shall, after being signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of said notice to the aforesaid Regional Director for forwarding to Nickel's for information, and, if it is willing, for posting by it in all locations where notices to its employees are customarily posted.

(d) Notify the Regional Director for Region 20, in writing, within 10 days of this Order, what steps have been taken to comply herewith.

---

<sup>11/</sup> In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words, "a Decision and Order", the words "a Decree of the United States Court of Appeals, Enforcing an Order".

B. Respondent Retail Clerks International Association, Local Union No. 839, AFL-CIO, its officers, agents, and representatives shall:

1. Cease and desist from inducing or encouraging any individual employed by Mead's Market to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining Mead's by picketing, or threatening to cause a work stoppage, or causing a work stoppage, or otherwise, where in either case an object thereof is to force or require Mead's Market to enter into any contract or agreement, express or implied, prohibited by Section 8(e) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Notify Mead's that it will not insist upon inclusion of the demonstrator clauses in any collective-bargaining agreement.

(b) Post in conspicuous places in its business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix B".<sup>12/</sup> Copies of said notice, to be furnished by the Regional Director for Region 20, shall, after being signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of said notice to the aforesaid Regional Director for forwarding to Mead's for information, and, if it is willing, for posting by it in all locations where notices to its employees are customarily posted.

---

<sup>12/</sup> In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words, "a Decision and Order", the words "a Decree of the United States Court of Appeals, Enforcing an Order".

(d) Notify the Regional Director for Region 20, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. April 3, 1967.

/s/ Frank W. McCulloch, Chairman  
/s/ John H. Fanning, Member  
/s/ Howard Jenkins, Jr., Member  
/s/ Sam Zagoria, Member

(SEAL)

NATIONAL LABOR RELATIONS  
BOARD

Member Brown dissenting:

For the reasons stated by the Trial Examiner, I would find that the clauses in issue were designed to preserve and protect unit standards, and hence were outside the prohibitions of Section 8(e). I would therefore dismiss the complaint in its entirety.

Dated, Washington, D. C. April 3, 1967.

/s/ Gerald A. Brown, Member

NATIONAL LABOR RELATIONS  
BOARD

## APPENDIX A

## N O T I C E

TO ALL MEMBERS OF RETAIL CLERKS INTERNATIONAL  
LOCAL UNION NO. 1288, (AFL-CIO)

PURSUANT TO  
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT induce or encourage employees of NICKEL'S PAY-LESS STORES OF TULARE COUNTY, INC., to refuse to perform services in the course of their employment or threaten, coerce, or restrain by picketing or other means NICKEL'S PAY-LESS STORES OF TULARE COUNTY, INC., where an object thereof is forcing or requiring NICKEL'S to enter into an agreement which is prohibited by Section 8(e) of the Act, as amended.

WE WILL NOT refuse to bargain collectively with NICKEL'S on behalf of its employees in the appropriate unit by insisting as a pre-condition to executing a contract that NICKEL'S accept, as a provision of such contract, a provision which is unlawful.

RETAIL CLERKS' INTERNATIONAL  
ASSOCIATION,  
LOCAL UNION NO. 1288 (AFL-CIO)  
(Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)



This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Ave., Box 36047, San Francisco, California, 94102 (Tel. No. 556-3197), if they have any question concerning this notice or compliance with its provisions.

---

## APPENDIX B

## N O T I C E

TO ALL MEMBERS OF RETAIL CLERKS INTERNATIONAL  
LOCAL UNION NO. 839, (AFL-CIO)

PURSUANT TO  
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT induce or encourage employees of MEAD'S MARKET to refuse to perform services in the course of their employment or threaten, coerce, or restrain by picketing or other means MEAD'S MARKET where an object thereof is forcing or requiring MEAD'S MARKET to enter into an agreement which is prohibited by Section 8(e) of the Act, as amended.

RETAIL CLERKS' INTERNATIONAL  
ASSOCIATION,  
LOCAL UNION NO. 839 (AFL-CIO)  
(Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Ave., Box 36047, San Francisco, California, 94102 (Tel. No. 556-3197), if they have any questions concerning this notice or compliance with its provisions.

BRIEF FOR PETITIONERS

IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 21,010**

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 1288, AFL-CIO; RE-  
TAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 839, AFL-CIO; and  
RETAIL CLERKS INTERNATIONAL ASSOCIA-  
TION, AFL-CIO,

*Petitioners,*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

JAMES R. MEAD and ROGER MEAD,  
d/b/a Mead's Market,

*Intervenors.*

On Petition to Review Order of  
National Labor Relations Board

United States Court of Appeals  
for the District of Columbia Circuit

FILED SEP 15 1967

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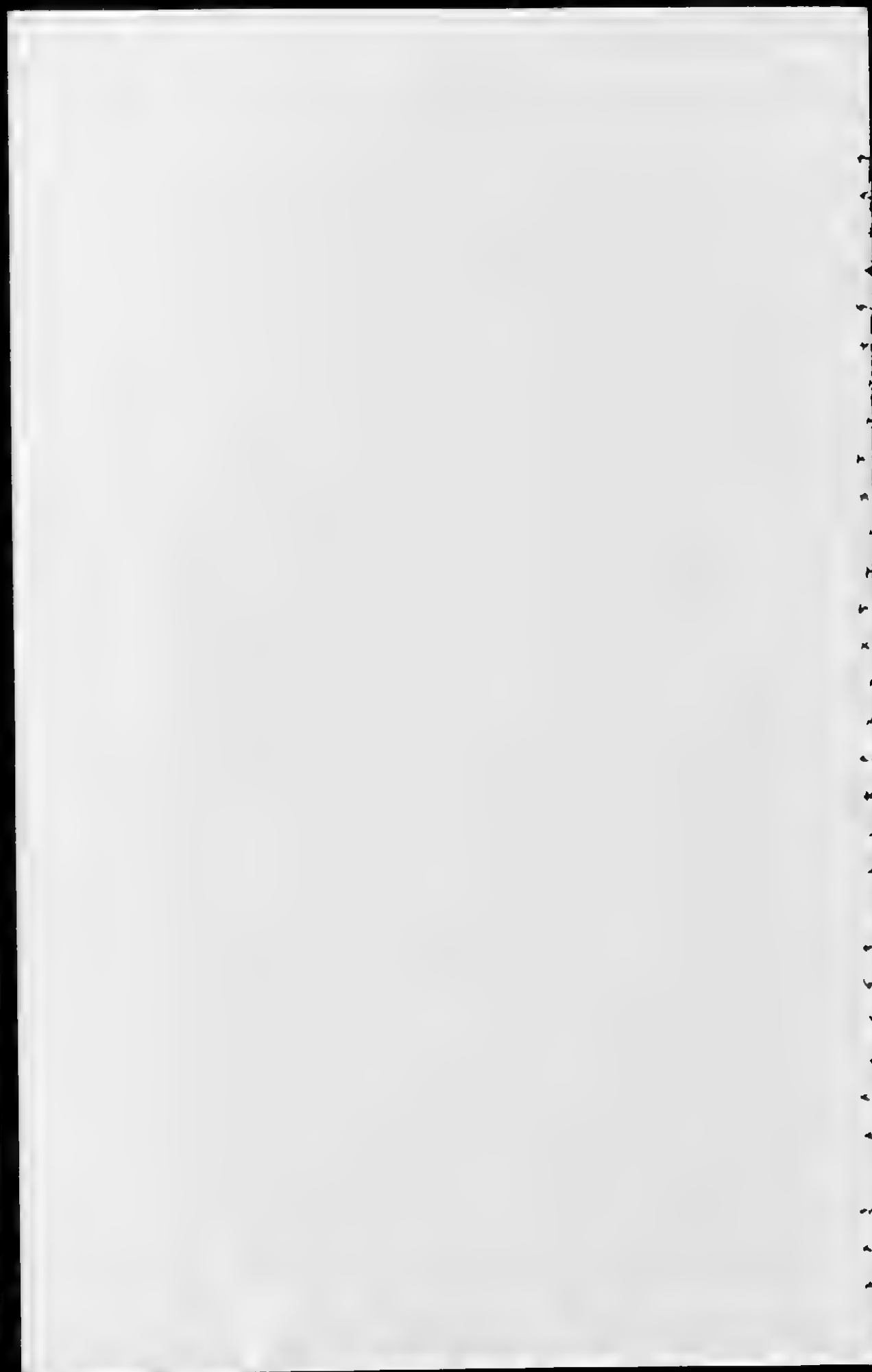
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and LIPPMAN,

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*Attorneys for Petitioners.*

CLERK



## Subject Index

	Page
Statement of question presented .....	Preface
Jurisdictional statement .....	1
Statute involved .....	2
Statement of points .....	2
Statement of the case .....	3
A. Preliminary statement .....	3
B. The development of demonstration work in retail food markets in Northern California .....	9
Pre-1937 .....	9
World War II and post-war period .....	11
The present situation .....	13
Summary of Argument .....	16
Argument .....	18
A. Where the Union's motive in negotiations was to pro- tect and preserve work which unit employees had his- torically performed and had a legitimate right to claim, there is no violation of Section 8(e).....	18
B. Demonstrators may properly be considered employees of the primary employer herein and are appropriately included in the bargaining unit and as subjects of work protection clauses .....	22
C. Demonstration work is an integral part of clerk's work and the interrelationship between demonstration duties and the other duties of retail clerks is so direct and traditional that petitioners are entitled to protect the integrity of the work unit by demanding and obtain- ing the contract clause in question .....	30
D. Concerted action undertaken by a Union to secure from the primary contracting employer a clause pro- tecting work opportunities for the contracting em- ployer's employees is not violative of Section 8(e)....	37
Conclusion .....	39

## Table of Authorities Cited

Cases	Pages
Citizen News Co. (1951) 97 NLRB 478 .....	28
Fibreboard Paper Products v. NLRB, 379 U.S. 203 .....	20
Flexco Products Corp. (1950) 88 NLRB 1163 .....	28
Houston Insulation Contractors v. NLRB, _____ U.S. _____, 87 S.Ct. 1293 .....	20
Kinsman v. Harton & Co., 251 P. 563 .....	29
Lewis v. NLRB, 350 F.2d 801 .....	23
Meat and Highway Drivers, Dockmen, etc. v. NLRB, _____ App. D.C. _____, 335 F.2d 709 .....	3, 6, 17, 32, 33, 37, 39
NLRB v. Armour and Co. (C.A. 10, 1945) 154 F.2d 570 ...	26
NLRB v. Atkins Co. (C.A. 7, 1945) 147 F.2d 730 .....	28
NLRB v. Joint Council of Teamsters No. 38, 338 F.2d 23 (C.A. 9, 1964) .....	20, 21
NLRB v. Lindsay Newspapers, Inc. (C.A. 5, 1963) 315 F.2d 709 .....	26
NLRB v. Local 28, Sheet Metal Workers, _____ F.2d _____, 65 LRRM 2867 .....	38
NLRB v. Northwestern Publishing Co. (C.A. 7, 1965) 343 F.2d 521 .....	26
NLRB v. Phoenix Mutual Life Ins. Co. (C.A. 7, 1948) 167 F.2d 983 .....	26
NLRB v. Retail Clerks International Association, 243 F.2d 777 (C.A. 2, 1956) .....	31
NLRB v. Retail Clerks International Association, 211 F.2d 759 (C.A. 9, 1954) .....	31
National Woodwork Manufacturers Association v. NLRB, _____ U.S. _____, 87 S.Ct. 1250 (1967) .....	18, 20, 30, 37, 39
New England Telephone and Telegraph Co. (1950) 90 NLRB 639 .....	28
Orange Belt District Council v. NLRB, 328 F.2d 534 (D.C. Cir. 1964) .....	31
Overton Markets, Inc., 142 NLRB No. 71 .....	29



# TABLE OF AUTHORITIES CITED

iii

	Pages
G. L. Palmer Packing Co. (1947) 74 NLRB 884 .....	28
Patten v. Bartlett, 89 A. 375 .....	29
Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177 .....	26
Retail Clerks Union Local 1428 (Food Employer's Council, Inc.) 155 NLRB 656 .....	36
Retree v. Davison-Paxon-Stokes Co., 118 S.E. 697 .....	29
S. & E. McCormick, 159 NLRB No. 1 .....	22, 25, 38
Texas O & E Ry. Co. v. McCarroll, 195 P. 139 .....	29
Todd Shipyards Corp. v. Industrial Union of Marine, etc., 344 F.2d 107 (C.A. 2, 1965).....	20, 35
United Insurance Company of America v. NLRB (C.A. 7, 1962) 304 F.2d 86 .....	26

## Statutes

National Labor Relations Act (as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 160(f)) .....	2
Section 2(3) .....	26
Section 8(b) (4) (i) (ii) (A) .....	3, 6
Section 8(e).....	8, 18, 20, 30, 32, 37, 38
Section 10(f) .....	2

**1 STATEMENT OF QUESTION PRESENTED**

Whether the Board erred in finding that the "demonstrator" contract provisions sought by the Unions are prohibited by Section 8(e) of the Act?

BRIEF FOR PETITIONERS

IN THE

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 21,000

---

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 1288, AFL-CIO; RE-  
TAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 839, AFL-CIO; and  
RETAIL CLERKS INTERNATIONAL ASSOCIA-  
TION, AFL-CIO,

*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

JAMES R. MEAD and ROGER MEAD,  
d/b/a Mead's Market,

*Intervenors.*

---

On Petition to Review Order of  
National Labor Relations Board

---

**JURISDICTIONAL STATEMENT**

This is a request for review of a Decision and Order of the National Labor Relations Board, dated April 3, 1967. Jurisdiction of this Court rests on

Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 160(f)).

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#### STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.) are printed in the Appendix, *infra*.

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#### STATEMENT OF POINTS

1. The Board erred in finding that demonstrators at the Employers' stores never engaged in regular clerk's work.
2. The Board erred in finding that demonstrators should not properly be includable in a unit of store employees.
3. The Board erred in finding that the clauses in question do not serve to limit work performed to employees in the store.
4. The Board erred in finding that the clauses in question do not seek to retain or secure work for unit employees.
5. The Board erred in finding that the clauses control employment practices of other employers.
6. The Board erred in failing to find that demonstration work is fairly claimable by unit employees and that the regulation thereof is not prohibited by Section 8(e).

7. The Board erred in failing to find that the contract clauses had as their object and motive the preservation of unit work and constituted lawful prohibition against the subcontracting of demonstration work.

8. The Board erred in concluding that such cases as *Meat and Highway Drivers, Dockmen, etc. v. NLRB*, \_\_\_\_\_ App. D.C. \_\_\_\_\_, 335 F.2d 709 and *S. & E. McCormick*, 159 NLRB No. 1, were not dispositive of the instant case.

9. The Board erred in concluding that petitioners violated Section 8(e) and 8(b)(4)(i)(ii)(A) of the Act and that Local 1288 violated Section 8(b)(3) of the Act, and in making any remedial order whatever, except dismissal of the complaint.

---

#### STATEMENT OF THE CASE

##### A. PRELIMINARY STATEMENT.

Retail Clerks International Association, Local Union No. 1288, AFL-CIO (hereinafter sometimes referred to as Local 1288), one of the petitioners herein, and Nickel's Pay-Less Stores of Tulare County, Inc. (hereinafter sometimes referred to as Nickel), have, for at least fifteen years prior to the filing of the underlying charges herein, been parties to collective bargaining agreements. Such agreements were negotiated with Food Industries Labor Service, Inc., a multi-employer bargaining group which represented a large number of employers throughout Northern

California (JA 134-135), and which had represented Nickel's in negotiations prior to 1964 at which time Nickel's withdrew from the multi-employer group to bargain directly with the local.

The other charging parties in the case below, James Mead and Roger Mead, co-partners engaged in operating a retail grocery market in Monterey, California, had not previously entered into a contract with Retail Clerks Union, Local No. 839 (hereinafter sometimes referred to as Local 839), but had, rather, commenced collective bargaining after the Board issued an order finding that Mead's had engaged in certain unfair labor practices and directed that it bargain with Local 839 as the exclusive representative of all employees at the Mead's store excluding meat department employees, guards, and supervisors as defined in the Act (James A. Mead and Roger Mead, co-partners d/b/a Mead's Market, 148 NLRB 383).

In the negotiations which were entered into for a contract commencing in 1964, Local 1288 and Local 839 were unable to reach agreement with the employers on the issues of wages, fringe benefits and the so-called demonstrator clauses. It is these latter clauses, proposed by the Unions, which were the subject of the underlying charges herein. Such clauses read, in applicable part, as follows:

"1(a) The Union is hereby recognized as the sole collective bargaining agency for an appropriate unit consisting of all employees working for the Employer within the jurisdiction of the Union . . .



1(b) All work and services, not defined as supervisory under Section 2 (11) NLRA connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employer's retail stores, including the demonstration of such products, shall be performed only by employees within the appropriate unit as defined in this Agreement . . .

8(f) Demonstrators. All work connected with or incidental to the demonstration of merchandise offered for sale in the Employer's retail store (except merchandise referred to in Section 1(b) hereof as being excluded from this agreement) shall be covered by this agreement, and all such work shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof. No demonstrator shall perform such work in the Employer's retail store unless said demonstrator is on the payroll of the Employer, party hereto, or a licensee of said Employer, and unless the Employer at all times holds and exercises full control of the terms and conditions of employment of any such demonstrators while such work is being performed in the Employers' retail store. Demonstrators shall be covered by all the terms of this agreement. All employees classified as demonstrators on April 1, 1964, shall be paid on the basis of the regular clerk's rate of pay." (JA 142-143).

A demonstration, in its simplest form, is defined as the offer of a free sample of the product to a customer (JA 135). Along with advertisements, reduced prices and special displays, the demonstration in all its aspects is an attempt to attract the attention of cus-

tomers to a product with the hope of engendering either an initial demand for the product or creating a continuing or additional demand for a product, with the end result of stimulating business and fostering increased traffic in the grocery store itself (JA 136).

As petitioners will demonstrate, *infra*, the demonstration of products was work which initially and historically had been performed by a retail clerk, and, accordingly, the respective local unions felt obligated to protect themselves from the loss of such work by means of the above described clauses and had, in fact, negotiated a new master agreement covering the Northern California grocery industry which contained the aforesaid demonstrator clauses (JA 135).

Following the failure to reach agreement with Nickel's and Mead's, on many issues other than the demonstrator clause, the local unions engaged in picketing and after several months of picketing, the Employers filed the subject charges alleging, respectively, that respondent Local 1288 violated Section 8(b)(4)(i)(ii)(A) and 8(b)(3) of the Act and that Local 839 violated Section 8(b)(4)(i)(ii)(A) of the Act. At the hearing thereafter conducted, petitioners herein stipulated that one of the objects of that picketing was to secure in any collective bargaining agreement reached with the Employers the enactment of the said demonstrator clauses (JA 15; 63).

The Trial Examiner relying upon this Court's decision in *Meat and Highway Drivers, Dockmen, etc. v. NLRB*, \_\_\_\_\_ App.D.C. \_\_\_\_\_, 335 F.2d 709, found as a

fact that the work of the demonstrator and the food clerk "must be regarded as bearing a close functional relationship" one to the other (JA 142), that "demonstrators' jobs are not only fairly claimable functionally, but historically we find the locals claiming the jobs to be subject to contract standards, and both the suppliers and the store owners acquiescing in the claim to the extent of using the locals as a source of supply and paying demonstrators the contract clerks' scale" (JA 152, 155); that the demonstrator clauses were "primarily designed for the lawful objective of unit preservation" (JA 155); and, accordingly, concluded that "the nature of the work, the character of the clauses, and the historical development considered together signify that the demonstrator clauses may properly be regarded as aimed at preserving unit work" (JA 157). Therefore, the Trial Examiner recommended that the complaint be dismissed in its entirety.

Thereafter the General Counsel and the Charging Parties filed exceptions to the decision. The Board, in its reversal of the Trial Examiner while tacitly admitting that the provisions seemed to validly limit demonstrator's work to employees of the grocery store, nevertheless, objected to the fact that such clause could allow demonstrators to be paid by licensees of the employers (JA 166).

In stating its objection, the Board entirely disregarded the fact that Section 8(f) of the collective bargaining agreement is specific, mandatory and conjunctive in requiring of the contracting grocery em-

employer that if he elects to have a demonstrator carried on the payroll of his licensee, the grocery employer must, nevertheless, continue to hold and exercise full control of the terms and conditions of employment of any such demonstrators while such work is being conducted in the store.

Despite the fact, as the Trial Examiner observed, that "precise unit placement [of demonstrators] is not an issue which has been litigated or even raised by the pleadings" (JA 157), the Board proceeded to make such a determination, finding that neither of the charging party Employers in this case had retained the required control of terms and conditions of employment of demonstrators when they utilized demonstrators on the payroll of licensees to conduct demonstrations at their stores and thereby, the Board concluded, petitioners submit erroneously, that the subject clauses still permit demonstrators to remain on the supplier's payroll and subject to their control. This, the Board held, distinguished the instant case from the clauses found legal by the Board in *S. & E. McCormick, Inc.*, 159 NLRB No. 1. Accordingly, the Board found, despite the fact that the clauses are only aimed at and affect the primary employer's relationship with the union, that the effect of the clause would be to subject secondary employers to the terms of contracts to which they were not parties (JA 167) and concluded that the local unions had engaged in the unfair labor practices charged. It is from that decision and order that petitioners seek the instant review.

**B. THE DEVELOPMENT OF DEMONSTRATION WORK IN  
RETAIL FOOD MARKETS IN NORTHERN CALIFORNIA.**

In order to adequately perceive the interrelationship between clerk's work and the conduct of demonstrations, it is essential to review the historical development of demonstration work as a part of the retail grocery operation.

**Pre-1937.**

Initially, even before the advent of general union contractual coverage in the food industry in Northern California in 1937, it was one of the duties of the retail clerk in a self-service grocery store to engage in suggestive selling, promotions and demonstrating products. This was usually accomplished by creating special displays or stacks of the product for which the market operator would receive a price discount or a display allowance from the supplier (TR. 442), or by placing a display at or near the checkstand and requiring the checkers to introduce or interest a customer in the particular product being demonstrated by the display (TR. 438-439; 734; 755; 808-809).

The testimony of Claude Jinkerson, a former grocery clerk, grocery store owner and manager and now Secretary of Retail Clerks Union, Local 648, San Francisco, California, and President of the California State Council of Clerks, illustrates the scope of the clerk's work in the demonstration area during this period of time (TR. 438-439).

The evidence further reflects that the usual situation at that time was that the clerk carried on the

demonstrator work as an adjunct to his other duties of stocking merchandise, displaying merchandise, creating special promotions and promotional material, as well as checking out merchandise (TR. 435-438; 760). However, it is significant that even then, if the volume of business in the store or the demand for the product that was created by the demonstration warranted it, the clerk who was engaged in demonstrating the merchandise would stand by the display of same for the entire day (TR. 528; 760). During this period, no persons other than the clerks themselves performed such demonstrations (TR. 735).

In view of the apparent emphasis placed by the Board in this case, on the alleged fact that present-day demonstrators are paid their wages by the supplier, it is interesting to trace the development of compensation for demonstrations. In the beginning there were various methods of reimbursing the grocer for his cost of "pushing" particular products. These included advertising allowances, display allowances and "sometimes helping with the payroll" of particular clerks doing demonstration work (TR. 441). The practice was for suppliers of particular products to approach the grocery employer with the request that a clerk employed in the store be assigned for a full day or days to demonstrate the supplier's product in the store in return for which the supplier would reimburse the employer for the expense of putting on the demonstration and offer an additional inducement to the employer by means of free case merchandise or other means (TR. 734-735). This was later changed



from a blanket sum of money paid by the supplier to the grocery employer to actual reimbursement for the exact salary of the employer's employee, i.e. the retail clerk, who was being utilized to perform the demonstration (TR. 441, 736).

#### **World War II and Post-War Period.**

During World War II, due to the shortage of manpower in the grocery industry, it was necessary for the market operator to obtain help in some cases outside of his regular payroll—evidently the practice which we now refer to as moonlighting. Although there are some earlier recorded incidents of persons other than the clerks in the store performing demonstrations in the store immediately preceding the War, it is apparent that due to the exigencies of the world conflict, any measurable degree of such a practice came into being only during the post-war period.

Depending upon the particular area of Northern California involved, it is apparent that in the late 1940's or early 1950's, while clerks were still being utilized by some of the food industry employers, the food employers began to assume the function of selecting persons outside their regular staff who came to be known as demonstrators, to conduct the demonstrations.

Apparently due to fear of legal complications, the former practice of blanket payments and discounts to the grocer was discontinued about this time and the suppliers began to reimburse the grocer for the exact amount of the wages of the demonstrator hired by the

grocer; and, in some cases, the supplier paid the wages directly to the demonstrator. This method of adding to his regular staff was popular with the grocery employer since it allowed him to continue to hold demonstrations on a full time basis within reducing his effective work force on Fridays and Saturdays, normally the busiest times for customer traffic in the store (TR. 464; 736, 737).

The Retail Clerks Union acquiesced in this method of handling the demonstrator situation since the food industry employers immediately and uniformly recognized that the demonstrators were performing what had been traditionally clerk's work and, thereby, that they were automatically covered under the food industry agreements of the respective Retail Clerks Unions. Consequently, from the very beginning of the practice the demonstrators were afforded the terms and conditions of those agreements (TR. 447-449; 704; 737; 772; 812; 833). Moreover, the Retail Clerks have always insisted upon holding the grocery employer responsible for the terms and conditions of employment of the demonstrators for the basic reason that these people were doing the same work as clerks, because as Mr. Jinkerson put it, "We were giving them (the grocery employer) permission to use an outsider to do the same work that our people were doing" (TR. 465). Such a point of view has always been readily accepted by the grocery employers themselves (TR. 721).

Necessarily, as a result of the above, no other union has subsequently represented or sought to represent the demonstrators and the demonstrators have been

continuously members of the Retail Clerks Unions (TR. 450). Indeed, at all times, the Retail Clerks Union, as the source of supply of demonstrators, has been and now is available to both the supplier (licensee) and the market operator to dispatch applicants for demonstrator positions to the market, with the only requirement being that the request to hold the demonstration and the conditions under which the demonstrator is to work have been cleared with the particular food employer involved (TR. 455-456; 730; 758; 772-774; 812; 824).

#### **The Present Situation.**

At present, the demonstrator pattern is basically the same as that outlined under the post-war resume, except that the demonstrator is performing more of clerk's work than merely handling the product demonstration aspect of that work. Thus, the demonstrators consistently and without contravention testified that they regularly stock displays (TR. 292-293), price mark merchandise (TR. 500), assist in cleaning up the store (TR. 832-833), inventory stock (TR. 831), and make sales and change as a checker would (TR. 553; 658) and even box or bag groceries (TR. 600; 663). In other words, holding a demonstration is the same as having an extra clerk in the store on those days on which a demonstration is being held. Indeed, when they can be spared the grocery clerks in the store still do the demonstrating, so as to avoid the hiring of an extra clerk (TR. 705).

One aspect of demonstrations has not varied, and that is the amount of supervision and control that the

food employer or his store manager asserts in the demonstrator arrangements. All requests from a supplier to hold a demonstration are cleared or rejected by the food employer (TR. 102; 113; 284-285; 554), since he obviously has full control over how much emphasis he desires to place on selling a particular product, whether it be by building a special display of the product or holding a demonstration thereof (TR. 442). After the request has been acted upon, a detailed and integrated campaign is embarked upon by both the employer and the supplier. The exact steps undertaken in this connection will be examined specifically *infra*.

On the day of the demonstration itself, all the witnesses are agreed that the employer or his manager exercises or have authority to exercise full control over the demonstrating employees' work and conduct in the store (TR. 96; 197; 272; 289; 398; 452; 557-558; 725). This control extends from assignment of times for breaks or lunch hours (TR. 557; 567) to actually terminating the demonstration if it is deemed necessary (JA 59; TR. 289; 726). This control is obviously necessary since demonstrations form part of the "image" of the entire store to customers.

Given the nature of the work involved and the fact of store control over the demonstrations, the Retail Clerks Unions have always looked to the food employer for their contractual relationships and at no time have the Unions executed a contract with any supplier covering the subject of demonstrations nor have the Unions ever made any such demand (TR. 457; 464-465).

However, in order to avoid any incipient problems and to make clear the responsibility of the food industry employer as to the conditions being afforded demonstrators and his obligation to observe the contractual protection of clerk's work as it relates to the conduct of demonstrations (TR. 460-464) a committee appointed by the Northern California Retail Food Clerks Unions in 1964 proposed to the food industry employers the clauses which are the subject of the instant dispute.

Also by this revision it was provided, for the same basic reasons already discussed, that a demonstrator, as part of the recognized collective bargaining unit, must either be on the payroll of the grocery employer or of a licensee of said employer. It is clear from the testimony of all witnesses with knowledge of the negotiation of this clause that it was considered a distinction for convenience without any real or substantive difference as it affects the status of demonstrators as, in reality, employees of the grocery employer while engaged in demonstrating in the retail store. As Mr. Houston stated, "it is just a convenient way to handle it." (TR. 723). In the case of Purity Stores, represented by Mr. Houston, the Kelly Girl agency is the "licensee" referred to in the contract, but it is clear from his testimony that he considers the demonstrators on the payroll of Kelly Girl to be, in fact, employees of and under the control of Purity Stores (TR. 704-705).

Pug Kilpatric, the Employer spokesman in practically all of the 1964 negotiations leading to the clause

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in question, made it clear that either the supplier when using demonstrators in the retail grocery stores or an agency such as Kelly Girl was the "licensee" referred to in the clause. In other words, despite the mechanics of payroll, the demonstrator works in the store only by permission of the grocery employer granted to his "licensee," the supplier or agency, and only under the conditions established and controlled by the grocery employer. These conditions were and are the terms of the Retail Clerks Union contracts (JA 116-117; TR. 740).

With the exception of the two employers involved in the instant litigation, this amendment was readily accepted in all the food industry agreements negotiated by the Unions herein (JA 135).

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#### SUMMARY OF ARGUMENT

Petitioners contend that for over forty years, retail clerks have been performing demonstration work in retail grocery stores and that the demonstration or dispensing of a free sample to customers is merely part of an integrated selling campaign of which the retail clerk is an integral part. Petitioners, as representatives of those clerks, submit that they have an historical right and duty to protect and preserve such work for the unit employees.

While the method of performing the demonstration may have changed in some instances from utilizing a clerk full time to demonstrate a product to bringing in another person outside the regular work force to

conduct the demonstration, petitioners contend that such development does not serve to change the basis of their legal right to the quantum of work itself.

Petitioners submitted proposals during the course of previous negotiations with the grocery employers to insure that the grocery operator was aware of his responsibility not to contract out unit work insofar as demonstrations were concerned. The grocery employers, for payroll and tax accounting purposes, sought to use licensees, but agreed to guarantee that they, and not the licensee would be the responsible party to insure that demonstrators would be afforded the terms and conditions of employment by retaining control over such employment. Petitioners agreed.

However, the Board adopted a narrow view of the historical development of demonstrations and restricted its consideration to the practices of the instant charging party employers, a rationale which petitioners contend has been repeatedly repudiated by this Court (see e.g. *Meat and Highway Drivers, Dockmen, etc. v. NLRB*, \_\_\_\_\_ App.D.C. \_\_\_\_\_, 335 F.2d 709, 716).

Despite the absence of any demonstrable unlawful motive or objective on the part of petitioners, the Board held this form of the demonstrator clause to have an unlawful secondary effect. Such holding is made on a record totally devoid of any showing that the disputed clause caused any cessation of business relationship with any employer whatever.

Petitioners contend that the Board should have considered the question of whether demonstration work

was fairly claimable work instead of disposing of the issue on unit placement of employees' rationale.

Since the action of petitioners in proposing the disputed clause was a lawful and mandatory subject of bargaining aimed at preservation of fairly claimable work, petitioners engaging in concerted activity against the primary employer cannot constitute a refusal to bargain in good faith or unlawful secondary activity.

#### ARGUMENT

A. WHERE THE UNION'S MOTIVE IN NEGOTIATIONS WAS TO PROTECT AND PRESEERVE WORK WHICH UNIT EMPLOYEES HAD HISTORICALLY PERFORMED AND HAD A LEGITIMATE RIGHT TO CLAIM, THERE IS NO VIOLATION OF SECTION 8(e).

The law is now developed to a point where it must be accepted by all concerned that a clause which is motivated solely by a union's desire to protect the jobs of its members in the bargaining unit has neither the purpose nor the effect of applying discriminatory secondary pressure upon outside "unfair" employers and thereby is not embraced within the scope of Section 8(e). See *National Woodwork Manufacturers Association v. NLRB*, \_\_\_\_\_ U.S. \_\_\_\_\_, 87 S. Ct. 1250 (1967).

To paraphrase the *National Woodwork Manufacturers Association* case, *supra*, "The determination whether the work reservation clause of [Section 8(f) of the Local 839 and Local 1288] agreement and its enforcement violated Section 8(e) and Section 8(b) (4)(B) cannot be made without an inquiry into

whether, under all the surrounding circumstances, the Union's *objective* was preservation of work for unit employees or whether the agreements and boycott were tactically calculated to satisfy Union objectives elsewhere." (*id.* at 1268; emphasis added).

The Board in the instant case appears to contend that where the particular primary employer does not assume his obligation to retain and exercise control over the work being performed in his store by persons carried on the payroll of his licensee, then irrespective of any contract requirements to the contrary in his agreement with the contracting union, the effect would be to subject those licensees to all of the terms of the contract to which they were not parties (JA 166). It was on this basis that the Board concluded that the clause was not designed to aid unit employees, but to assist union members in general (JA 167). Such a conclusion, petitioners submit, is not only without foundation in fact in this record, but also fails to make the initial determination which the law requires to be made as to the motive and object of the local unions' attempted negotiation of the disputed clause.

If the Board had discharged this obligation to make an inquiry into the circumstances surrounding the promulgation of Section 8(f) of the agreement, as the detailed Statement of Facts, exhaustively shows, it could have come to no other conclusion but that every contemporaneous action of the local unions involved herein in attempting to negotiate and in securing from its contracting employers the clauses in question, was motivated and directed solely by an interest in the

preservation of work which unit employees had historically performed and had the legitimate right to claim; the purpose is entirely alien to any prohibited objective of Section 8(e) (see, e.g. *National Woodwork Mfgs. Assn. v. NLRB*, *supra*, at 1268, 1269; *Houston Insulation Contractors v. NLRB*, \_\_\_\_\_ U.S. \_\_\_\_\_, 87 S.Ct. 1293; *Fibreboard Paper Products v. NLRB*, 379 U.S. 203; *Todd Shipyards Corp. v. Industrial Union of Marine, etc.*, 344 F. 2d 107 (C.A. 2, 1965); *NLRB v. Joint Council of Teamsters No. 38*, 338 F. 2d 23 (C.A. 9, 1964).

Given a lawful object on the part of petitioners in its bargaining with the grocery operators, should have ended further inquiry in this case, since the *National Woodwork* case, *supra*, makes it clear beyond doubt that Section 8(e) cannot be read as a flat prohibition against subcontracting or against other restrictive clauses which might have as an incident thereto a cessation in business relationship or which might otherwise affect the relationship between a primary and a secondary employer.

Aside from the consideration of the work preservation claim and the historical basis thereof which has already been detailed, petitioners' motive and object is made manifestly clear by the complete absence in this record of any demonstrable countervailing objective. Thus, the record reflects that the demonstrators are, and always have been, members of the respective Retail Clerks Unions (JA 140-141). There is no question raised of competing with any other union. Nor is there any evidence whatever which would establish

that there is or has been a dispute at any time between the Clerks Unions and the suppliers who utilize demonstrators. Accordingly, there is no basis in the evidence to support a finding that the clause involved is aimed at the Unions' differences with another or secondary employer (*Cf. NLRB v. General Council of Teamsters No. 38*, 338 F.2d 23, 28 (C.A. 9, 1964)). Suppliers are not required to recognize the Union, to sign or even to abide by the collective bargaining agreement which the Union has with the primary employer with whom the sole obligation to adhere to the agreement rests. It is the signatory grocery employer who is responsible for seeing that persons performing demonstration work in the store, whether they be full time clerks or otherwise, are afforded the contract terms.

Finally, but perhaps most significantly, the Unions' total lack of any prohibited objective is made evident when one considers that the proposal to add the words "or licensees" which the Board objects to, was not a proposal initiated by the Unions, but rather was a proposal from the employers in a desire to relieve themselves of accounting problems. Thus, Pug Kilpatric, the Executive Secretary of the Food Industry Labor Service, Nickel's former bargaining representative, testified, "We agreed that if the unions would add the words 'or licensee' that we would still be the responsible party to see that the people got all of the benefits under the contract." (JA 117).

The Unions merely acquiesced in the Employers' proposal, but by the instant action, the Board would



have this Court believe that the Union acceptance of such an employer proposal transform the objective and converts, in some as yet inexplicable way, the Unions' motive in seeking these protective provisions. Such a position, petitioners submit, is the purest elevation of form over substance, without foundation in fact. If the Unions had maintained their positions and refused to acquiesce in the "or licensee" amendment proposed by the Employers for the latter's own bookkeeping benefit, presumably the Board would have found the clauses legal on the same ground upon which it validated substantially similar clauses in the case of *S. & E. McCormick*, 159 NLRB No. 1. Given proper consideration of the evidence, the results should not have differed in the instant matter.

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**B. DEMONSTRATORS MAY PROPERLY BE CONSIDERED EMPLOYEES OF THE PRIMARY EMPLOYER HEREIN AND ARE APPROPRIATELY INCLUDED IN THE BARGAINING UNIT AND AS SUBJECTS OF WORK PROTECTION CLAUSES.**

While petitioners submit that the case may be disposed of on the grounds enunciated above, petitioners will nevertheless proceed to explore and refute other conceivable grounds which may be raised by the Board's decision.

Throughout its decision, the Board, while recognizing that the grocery industry in Northern California is a highly organized one with a uniform industry agreement, nevertheless, persists in propounding the claim that the legality of the clauses must be viewed apart from the industry background

and isolates same in the Nickel's and Mead's operations.

Even if we assume *arguendo* and contrary to the record that these employers are somehow unique from the thousands of other food employers in Northern California in the conduct of demonstrations, nevertheless, there is no case cited to petitioners which would make the test of lawful activity dependent upon such a narrow base. Indeed, one of the most recent illustrative cases indicating a contrary intent is that of *Lewis v. NLRB*, 350 F.2d 801, 802.

The test, as enunciated by this Court is not restricted to an individual operator in a vacuum and apart from historical considerations which lend weight to respondents' claim that this clause is, indeed, "germane to the economic integrity of the principal work unit" and "sought to preserve the work and standards the union has bargained for." Nickel's itself, one of the charging parties before the Board, was part of the very industry bargaining unit with whom this subject was discussed and which entered into the 1961-1964 agreement which specifically codifies the understandings relative to demonstrators (JA 134). Since Nickel's was part of the multi-employer food industry negotiating group, it is difficult if not impossible to perceive how the Board can even advance the argument that this historical practice and coverage must be disregarded merely because Nickel's in the past may have technically violated its contract and, in the latest negotiations, has now withdrawn from multi-employer bargaining. Nickel's exit therefrom at this

time cannot serve to change the historical basis of the clerk's claim.

Moreover, such contentions deliberately disregard the evidence in the record as it specifically relates to the conduct of demonstrations at Nickel's and Mead's. Thus, the credible testimony of the demonstrators, themselves, who have worked at the charging parties' establishments is uniform in affirmatively establishing that there is no difference in practice engaged in by either Nickel's or Mead's in regard to the demonstration of merchandise and the demonstrator's duties or work in those stores, from that of any other food industry employer in Northern California (see e.g. TR. 593-594; 837-838; 847).

Indeed, each of the demonstrators presented as witnesses testified that there is no substantial difference in the nature of their duties whether they be performed at a large chain store establishment or at a so-called "mom and pop" store except that in the latter instance more clerk's work is required of the demonstrator than just standing by the product display and attempting to introduce customers to the product (see e.g. TR. 594). In summary, there is nothing unique about Nickel's or Mead's demonstrations. Accordingly, in assessing the legality of petitioners' conduct, petitioners submit that the relevant consideration is the problem facing the Clerks Union in the food industry as a whole, namely, to make clear the responsibility of the food industry employer as to the conditions being afforded demonstrators and his obligation to observe the contractual protection of

clerk's work as it relates to the conduct of demonstrations.

Apparently under the Board's view of this case, the Union is not able to protect itself with an individual employer in advance of any incipient problems, if those problems have not developed already in the store at the time of the bargaining negotiations. The Board has, itself, rejected this same theory in the case of *S. & E. McCormick, Inc.*, 159 NLRB No. 1, stating as follows:

"Obviously, any agreement prohibiting or restricting the subcontracting of unit work has an impact on business relationships, actual or potential, and often requires a total cessation of existing business relationships. Yet we have long held that agreements banning or curbing this subcontracting of the unit work are not unlawful for that reason alone. If the clauses are otherwise lawful, the mere fact that, as an incident thereto, a cessation in business relationships may flow from their operation is not alone enough to establish an unlawful secondary object within the intent of Section 8(e). To conclude otherwise, would mean that unions would be limited to negotiating clauses prohibiting or restricting subcontracting to those situations where the employer is not engaging in any subcontracting at the time of the making of the contract. Under that view, once work had been subcontracted it could never be considered to be unit work because it would disrupt a business relationship to require the employer to cease doing business with a subcontractor. We have been cautioned against such a result by the judicial admonition that the 'cease doing

business' language in section 8(e) cannot be read literally."

Petitioners submit that there should have been no departure from the principles enunciated in *McCormick* when examining the instant case, especially, where, as here, the work involved is so interrelated that one has a direct impact on the other and thereby cannot be disposed of by adopting a narrow definition of employee status as the Board has done in its decision herein.

By all of the traditional and precedential tests demonstrators are clearly employees of the food market operator within the meaning of Section 2(3) of the Act when performing their work in the retail market. It has long been firmly held by the Board and the Courts that the term "employee" as used in the Act must be given a broad and comprehensive meaning, and that it should be construed in the light of the end to be obtained. *NLRB v. Armour and Co.* (C.A. 10, 1945) 154 F.2d 570; *Phelps Dodge Corp. v. NLRB* (1941) 313 U.S. 177.

The true test of employment status within the meaning of the Act has always been the right to exercise control and direction of the activities of the persons performing the work in question. *NLRB v. Northwestern Publishing Co.* (C.A. 7, 1965) 343 F. 2d 521; *NLRB v. Phoenix Mutual Life Ins. Co.* (C.A. 7, 1948) 167 F. 2d 983; *United Insurance Company of America v. NLRB* (C.A. 7, 1962), 304 F. 2d 86; *NLRB v. Lindsay Newspapers, Inc.* (C.A. 5, 1963), 315 F. 2d 709. This record, as already noted, is replete

with evidence of this type of control and direction which is, in fact, exercised by the market operator over the activities of the demonstrator. Moreover, the contract clauses, readily accepted by practically all employers in Northern California, save these charging parties, specifically grant to and require of the market operator this direction and control.

In truth demonstrators are not employees of the supplier but are instead closely kindred to other store employees. The contract recognizes demonstrators as employees of the market operator or the primary employer. Demonstrators spend all of their working time on the premises of the store working alongside other store employees, and are engaged in promoting the sale of the market operator's products. Pursuant to provisions of the contract the market operator exercises or has authority to exercise full control over the employees' wages, hours, working conditions and conduct and is responsible for compliance with provisions of the contract. Demonstrators receive the rate of pay fixed in the contract. Consequently demonstrators occupy a position substantially identical with the other employees in the market.

The role which the supplier plays in setting up the demonstration, sometimes selecting the demonstrator (although through the Union hiring service) and making the actual payment of wages is a function which the market operator has delegated or permitted the supplier to assume, for the market operator's convenience and as its licensee. Of course all arrangements for a demonstrator must be approved by the

market operator. The Union hiring office, as the source of demonstrators, is open to both supplier and market operator and is in fact a service rendered to the market operator.

The emphasis given by the Board to the source of payment of wages to some demonstrators is misplaced. The Board and the Courts have never held that this factor is controlling in determining employee status under the Act, nor that inclusion on the employer's payroll is necessary to establishment of an employer-employee relationship. *Citizen News Co.* (1951) 97 NLRB 478; *NLRB v. Atkins Co.* (C.A. 7, 1945), 147 F. 2d 730. Moreover, the Board has held that employees of an agency, under circumstances similar to these here, may be found to be employees of the principal. *New England Telephone and Telegraph Co.* (1950), 90 NLRB 639. Finally the mere fact that employment is irregular or intermittent does not in such circumstances as these affect the employment status. *Flexco Products Corp.* (1950), 88 NLRB 1163; *G. L. Palmer Packing Co.* (1947), 74 NLRB 884.

This record demonstrates the following: interchangeability of employee's duties during a demonstration, such as both clerks and demonstrators engaging in building and replenishing special displays, price marking and suggestive selling; that the suppliers are allowed to participate in the food employer's advertising campaign, for which the latter is reimbursed by the advertising allowance or reduced invoice price; that the food employer, in return for an increased order of merchandise in anticipation of



the demonstration, is guaranteed a return on the unused quantities; and, finally, that the food employer or his representative is afforded full supervision and control over the actions of the demonstrator in the store. Respondents submit that these facts not only establish that demonstrators are employees of the food employer, but also that the food employer and the supplier constitute, at the very least, joint venturers in the demonstration, albeit that the venture lasts only one or two days at a time. Many of these same factors were present in the case of *Overton Markets, Inc.*, 142 NLRB No. 71, where the Board found a joint employer relationship to exist.

Actually, it is not necessary to go this far to support the proposition that demonstrators are properly integrated in the primary bargaining unit. The contract provision making the supplier or a demonstrator agency the licensee<sup>1</sup> of the retail food employer is plainly proper and lawful. The market operator manifestly controls his own premises and he may grant or deny permission to enter upon those premises for any or no reason and under any conditions determined solely by him. This the market operator has done as to the supplier and as to persons sent there by the supplier. Merely because the contract permits

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<sup>1</sup>The legal concept of licensee is, of course, well known to the law. In its simplest form a licensee is a person who by permission or authority is granted the right to enter the premises or property of another. *Texas O & E Ry. Co. v. McCarroll*, 195 P. 139, 141; *Kinsman v. Harton & Co.*, 251 P. 563, 564. A licensee, however, does not necessarily stand in any contractual relation with the owner and is permitted to go on the premises for his own interest or convenience. *Patten v. Bartlett*, 89 A. 375, 376; *Retree v. Davison-Paxon-Stokes Co.*, 118 S.E. 697, 698.

the licensee to directly pay the demonstrator does not alter the fact that the food employer has made the demonstrator his employee while performing services in the store. As the trial examiner, we submit, correctly found, "it stands undisputed that respondents regard with indifference the issue of who hires or pays the demonstrators so long as the ultimate responsibility for meeting union contract standards rests with the store owner with whom the local has the contract" (JA 80-81). It is abundantly clear that all of the important and necessary indicia of employment status as between the demonstrator and the food market operator is present in this case and is controlling.

The crucial question, petitioners submit, is not, however, whether demonstrators are employees of the store, but rather, whether demonstration work constitutes work which is fairly claimable by unit employees in their contract negotiations.

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2. DEMONSTRATION WORK IS AN INTEGRAL PART OF CLERK'S WORK AND THE INTERRELATIONSHIP BETWEEN DEMONSTRATION DUTIES AND THE OTHER DUTIES OF RETAIL CLERKS IS SO DIRECT AND TRADITIONAL THAT PETITIONERS ARE ENTITLED TO PROTECT THE INTEGRITY OF THE WORK UNIT BY DEMANDING AND OBTAINING THE CONTRACT CLAUSE IN QUESTION.

Petitioners have previously examined the fact that the *National Woodwork Mfrs.* case, *supra*, stands for the proposition that Section 8(e) of the Act cannot be interpreted to invalidate clauses which are mandatory subjects of collective bargaining. This is especially relevant to the instant case since this "clerk's

work" clause of Section 1 of the agreement was examined by the Ninth Circuit in the case of *NLRB v. Retail Clerks International Association*, 243 F. 2d 777 (C.A. 2, 1956). In that case, the Court specifically held that the Retail Clerks Union involved was bargaining in good faith by insisting upon and ultimately contracting with the employer for this same clerk's work clause, which is once again before the Court in the instant matter. See also: *NLRB v. Retail Clerks International Association*, 211 F. 2d 759 at 768-769 (C.A. 9, 1954), where Judge Bone's dissenting opinion raised the validity of clerk's work as a mandatory bargaining subject. Judge Bone later wrote the majority opinion in the 1956 decision of the Court, *supra*.

In *Orange Belt District Council v. NLRB*, 328 F. 2d 534 (D.C. Cir. 1964), this Court set forth in the clearest of terms the rationale of the distinctions which must be drawn in this kind of case.

Petitioners have already detailed their reasons for believing that the Board, purporting to interpret Sections 1(b) and 8(f) of the Unions' collective bargaining agreements, erred in failing to consider the historical practices in the industry as a whole which established the nature and scope of clerks' work. In that discussion, petitioners demonstrated that in an effort to avoid the application of these fundamental tests established by the Courts to this case, the Board narrowly restricted its inquiry to what it considered to be the historical practices of the two charging party employers. In effect, the Board in the instant

decision is contending that if the employer had not in the past employed persons to do demonstration work or if he utilized employees who were on the payroll of licensees without retaining complete control over the work, that any attempt to preserve and protect such work is in direct contravention of Section 8(e), and it is irrelevant in the Board's view, whether the work is fairly claimable by the unit employees.

In this regard petitioners submit that the Board has fallen into the same error condemned by this Court in the case of *Meat & Highway Drivers, Dockmen, etc. v. NLRB*, \_\_\_\_\_ App. D.C. \_\_\_\_\_, 335 F. 2d 709. In that case the Board, of course, initially found that delivery of out of state shipments was work which "historically" was not performed by local drivers who were members of the bargaining unit, but which was, instead, performed by over the road drivers employed by interstate carriers. A majority of the Board in a three to two decision, held that these deliveries were not bargaining unit work, and, therefore, they could not be the subject of a clause which would allocate that work to the bargaining unit. This Court refused to enforce the Board decision and set forth what are inevitably the guide lines in the instant action.

In *Meat & Highway Drivers, supra*, the majority of the Board took a position that because certain work had not specifically been performed by the members of the bargaining unit that the allocation of such work would constitute a cessation of business within the meaning of Section 8(e), since the employees per-

forming work at that time were employed by employers other than the contracting employer. The Board reverts to a similar finding in the instant case. The Court rejected such a holding in *Meat & Highway Drivers, supra*, and should do likewise in the instant matter. We submit that the Trial Examiner was correct not only in his utilization of the principles of the *Meat & Highway Drivers* case, *supra*, but also in his application of the principles of that case to the instant matter and that the Board erred in believing that it was not compelled to consider the question of "fairly claimable" work.

Throughout this record and this brief, petitioners have tried to make it clear that a person performing demonstration work does not stand apart from the rest of the retail work force, but rather functions as an integral part of the overall selling campaign. A demonstrator, just as a clerk, is expected to know the prices of not only her product, but also competitive products (TR. 98; 192; 596; 656). A demonstrator is expected to, and actually does, stock displays (TR. 292-293), including products which he is not at that time demonstrating (TR. 656-657). Further, as pointed out above, demonstrators price-mark merchandise (TR. 500), assist in cleaning up the store (TR. 832) and even box or bag groceries (TR. 600; 663). Demonstrators engage in making sales and are accountable to the store manager for money received in their transactions (TR. 533; 658).

All of the aforesaid activities, which, parenthetically, are all performed by clerks in the bargaining

unit also, are expected of the demonstrator by the food employer or store manager are performed at the direct request of management in some cases (TR. 598; 660). Since the demonstrator engages in all these activities that are admittedly clerks' work, it is readily understandable why clerks who are currently unemployed apply for work as demonstrators and vice versa (JA 142).

This whole area of the interrelation between the demonstrator's duties and the clerk's becomes readily apparent when one reviews the testimony of the various witnesses presented and compares the quantum of work involved in a demonstration put on by so-called outside demonstrator with that of a clerk's demonstration of the same merchandise in the store. The only difference which can be seen is that a clerk does not usually physically stand by the display for the most part, but engages in other activities during the same day.

Nor is there any distinction to be drawn because the demonstrator makes a few remarks about a particular product; the clerks do the same thing (TR. 560).

Under all the circumstances, it is plain that the demonstrators are actually performing clerks' work; work that is fairly claimable in the collective bargaining unit and lawfully made a part of a collective bargaining agreement (TR. 465-466).

Given the fact, as indicated above, that the work is not only fairly claimable, but that clerks are performing this very work, it should not be overlooked that

the instant contracts also specifically prohibit subcontracting unless the work of any subcontract is performed only by members of the bargaining unit and the primary food employer holds and exercises full control of the terms and conditions of employment of all such members of the unit pursuant to the terms of the contract. (G.C. Ex. 17, Section 1(d); G.C. Ex. 18, Section 1(d).) Plainly, this clause is a work protection clause also not in conflict with Section 8(e) of the Act and neither the complaint nor the decision of the Board herein significantly fails to attack this clause. Just as plainly this same clause applies to and controls demonstration work just as it applies to and controls all other clerks' work as defined in Section 1(b) of the contract. The failure of the Board in the instant decision to consider this clause as bearing on the problem, reinforces petitioners' belief that the Board's sole reliance in condemning the instant demonstrator clause stems from its misconstruction of the intent and objective of that clause as it applies to licensees of the employer. Again in this area of subcontracting, the Board should have defined the Unions' motive and objective and analyzed the clauses from that standpoint just as the Court did in the case of *Todd Shipyards Corp. v. Inds. Union of Marine, etc.*, 344 F. 2d 107 (C.A. 2, 1965):

"It follows from the Supreme Court's holding that freedom to subcontract is a mandatory subject of collective bargaining, that at least some contractual prohibitions against subcontracting, i.e., the results of such mandatory bargaining, must be outside the scope of Section 8(e). Dis-



inctions must be made between contractual prohibitions on subcontracting which merely serve as legitimate job protection devices and those which go farther to accomplish ends Congress meant to prohibit under 8(e). Compare, *Meat & Highway Drivers' Union v. NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709, 712-714 (1964), with *NLRB v. Teamsters Union, Local 294*, 342 F.2d 18 (2d Cir. 1965); *District 9, Int'l Ass'n of Machinists v. NLRB*, 114 U.S. App. D.C. 287, 315 F.2d 33 (1962). In the present case Article XXVII neither on its face nor as construed by the parties blacklists 'specified employers or groups of employers because their products or labor policies are objectionable to the Union.' Cox, *The New Hot-Cargo and Secondary Boycott Sections: A Critical Analysis*, 44 Minn. L.Rev. 257, 259 (1959). The contractual prohibitions here in dispute merely insure that Todd will not be able to avoid wage, job security and other obligations contained in its agreement with the union." (id. 108-109.)

Such an analysis would have required the Board to engage in a factual review of this record and not indulge in conjecture to equate these demonstrator clauses with entirely different clauses under entirely different circumstances found illegal in *Retail Clerks Union Local 1428* (Food Employer's Council, Inc.) 155 NLRB 656. In that case, the employees involved were represented by a competing union, which fact is entirely absent in the instant case, and the primary employer was obligated to execute a concessionaire agreement with the secondary employer covering the

terms and conditions of employment of that employer's employees. The Board concluded there that such an agreement bore the vice of a so-called union signatory clause and was "aimed really at the [respondent unions] differences with another employer". The same cannot be said in the instant case.

Not one of the employers or suppliers who testified were able to state that there was any change or cessation of business by reason of the negotiated clause, either in their dealings with Nickel's or Mead or with any of the other hundreds of retail food employers. Nor was there any evidence of any "differences" between the clerks' unions and the suppliers. Presumably, the Board in expanding its theory in the instant case would have readily embraced any opportunity on the record to show such a cessation of business and its failure and complete inability to do so is but another indication that the decision lacks any foundation.

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**D. CONCERTED ACTION UNDERTAKEN BY A UNION TO SECURE FROM THE PRIMARY CONTRACTING EMPLOYER A CLAUSE PROTECTING WORK OPPORTUNITIES FOR THE CONTRACTING EMPLOYER'S EMPLOYEES IS NOT VIOLATIVE OF SECTION 8(e).**

We have demonstrated the applicability of the *National Woodwork Manufacturers Association* case, *supra*, and the *Meat and Highway Drivers* case, *supra*, to this case and submit that Petitioner's position is made even clearer by a consideration of one of the latest Court decisions which considers the entire area of work preservation and subcontracting clauses. In

*NLRB v. Local 28, Sheet Metal Workers*, ..... F. 2d ....., 65 LRRM 2867, the 2nd Circuit in the cited case found no violation of Section 8(e) in a clause which required certain fabricated items to be manufactured only by a contractor having a signed agreement with the local Union. As may be readily seen, the facts of that case go beyond any position of petitioners in the instant matter, yet the Court, we submit quite properly, assessed the motive of the Union and found no prohibited conduct:

“There is not the slightest evidence, nor is there the least reason to believe, that the purpose of Local 28 in demanding that National and Kerby not use the dampers manufactured by Johnson was to bring pressure on Johnson with respect to the employees at Johnson’s Milwaukee plant.

\* \* \*

• “On the contrary, every indication points to  
 • the conclusion that Local 28 was seeking to pre-  
 • serve for its own members, who were employees  
 • of the employers belonging to the two Associa-  
 tions, the work of fabricating dampers which had  
 traditionally been done in Association shops by  
 members of Local 28. In the terms of the *National Woodwork* and *Houston* cases, the Union’s  
 pressure was directed at their own employers  
 for a purpose which those cases held to be ‘pri-  
 mary’ and outside the scope of Section 8(e) and  
 Section 8(b)(4)(ii)(A) and (B) of the Act.  
 None of the respondents participated in any ac-  
 tivity which had for its purpose the direction of  
 any ‘secondary’ pressure against Johnson or  
 any other employer.” (Id. at p. 2870.)

Hence, also, the totality of conduct on the part of petitioners evidenced no object to affect the labor relations of a secondary employer and the Board was unable to find same. As we have repeatedly stated and the record demonstrates, the evidence of Petitioners' object must be found to be work protection and preservation and thereby, lawful activity.

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### CONCLUSION

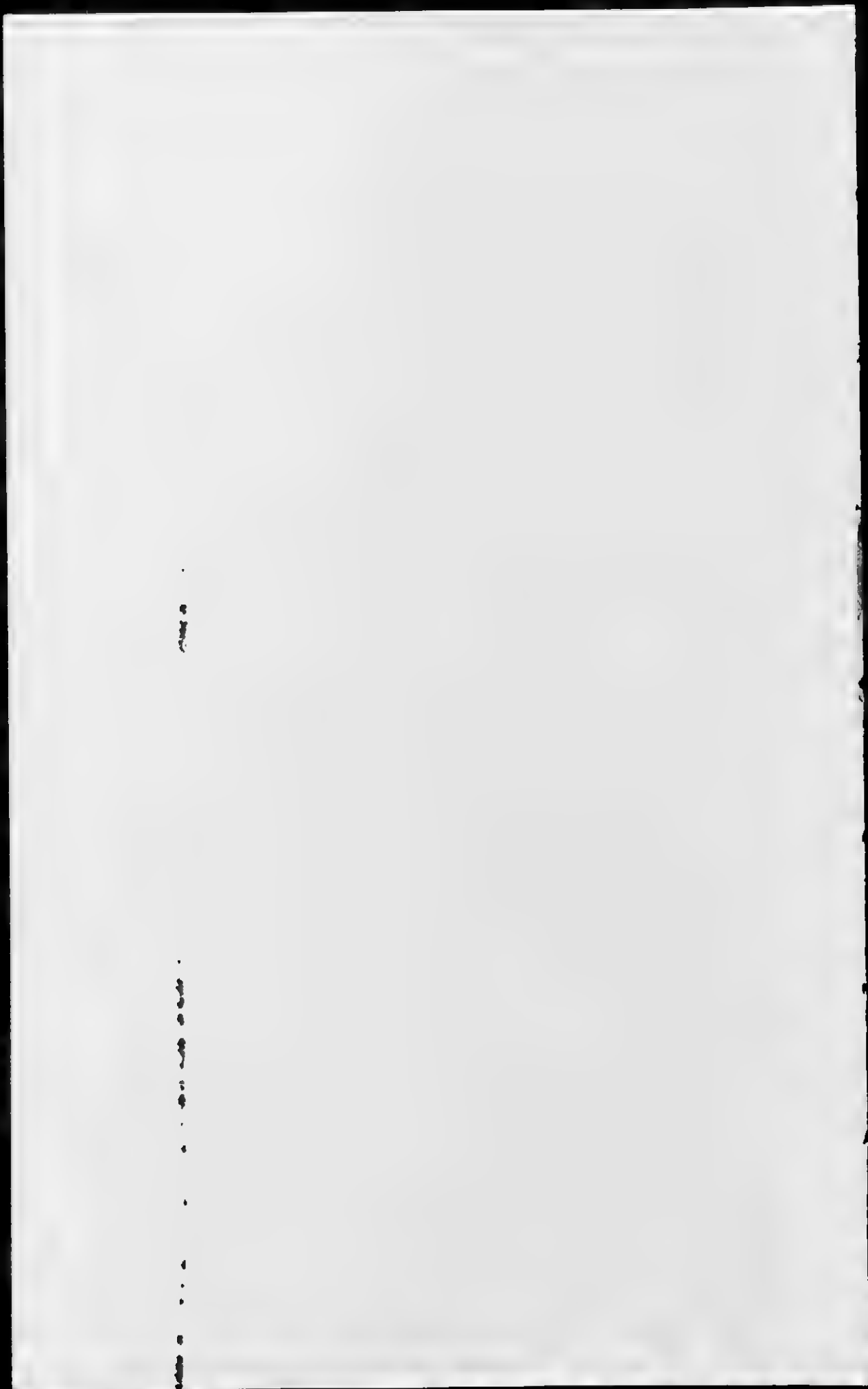
Under the above described circumstances it is evident that the Board acted under a total misinterpretation of the plain contract language, without consideration of Petitioners' motive and object, in making its decision. While it may be said that the Board's decision occurred prior to the *National Woodwork, Houston Installation* and *Local 28* cases, the same argument is not available to excuse the Board from applying the principles enunciated by this Court in the *Meat and Highway Drivers* case. Under the clear rationale of all these cases, the Board's decision cannot stand.

Dated: September 11, 1967.

CARROLL, DAVIS, BURDICK & McDONOUGH,  
By ROLAND C. DAVIS,  
ROBERT P. COWELL,  
S. G. LIPPMAN,  
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(Appendix Follows)

## **Appendix**



## Appendix

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### Sec. 8(b)(3) of National Labor Relations Act:

(b) It shall be an unfair labor practice for a labor organization or its agents— . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

\* \* \* \* \*

### Sec. 8(b)(4)(i)(ii)(A) of the National Labor Relations Act:

(b) It shall be an unfair labor practice for a labor organization or its agents— . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); . . .

\* \* \* \* \*

### Sec. 8(e) of National Labor Relations Act:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter



into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.



**BRIEF FOR INTERVENORS**

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 21,010**

---

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 1288, AFL-CIO; RE-  
TAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 839, AFL-CIO; and  
RETAIL CLERKS INTERNATIONAL ASSOCIA-  
TION, AFL-CIO,

*Petitioners,*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

JAMES R. MEAD and ROGER MEAD,

d/b/a Mead's Market,

*Intervenors.*

On Petition to Review Order of  
National Labor Relations Board

United States Court of Appeals —  
for the District of Columbia Circuit

FILED NOV 6, 1967

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## Subject Index

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	Page
Statement of question presented .....	Preface
Counter-statement of the case .....	1
Summary of Argument .....	4
Argument .....	4
A. The demonstrators are not employees of Mead's Market	4
B. Demonstrator work is not fairly claimable by unit employees, and it is not the thrust of petitioners' efforts that it be performed by unit employees .....	5
Conclusion .....	8

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## Table of Authorities Cited

---

	Pages
Meat & Highway Drivers, Dockmen, etc. v. NLRB, 335 F. 2d 709 (D.C. Cir. 1963) .....	5, 6
NLRB v. Jt. Council of Teamsters, 338 F. 2d 23, 28 (C.A. 9 1964) .....	8
NLRB v. Local 28, Sheet Metal Workers, ____ F. 2d ____, 56 LC No. 12061, 65 LRRM 2867 (C.A. 2 1967) .....	5, 6
NLRB v. Steinberg & Co., 182 F. 2d 850 (C.A. 5, 1950) ...	5
National Woodwork Manufacturers Association v. NLRB, ____ U.S. ____, 87 S. Ct. 1250 (1967) .....	4
Orange Belt District Council v. NLRB, 328 F. 2d 534 (D.C. Cir. 1964) .....	5, 6
S. & E. McCormick, Inc., 159 NLRB No. 1 (1966) .....	6, 7
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) ....	5

**STATEMENT OF QUESTION PRESENTED**

The question is correctly stated by petitioners:

Whether the Board erred in finding that the "demonstrator" contract provisions sought by the Unions are prohibited by Section 8(e) of the Act?

IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,010

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 1288, AFL-CIO; RE-  
TAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 839, AFL-CIO; and  
RETAIL CLERKS INTERNATIONAL ASSOCIA-  
TION, AFL-CIO,

*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

JAMES R. MEAD and ROGER MEAD,  
d/b/a Mead's Market,

*Intervenors.*

On Petition to Review Order of  
National Labor Relations Board

**BRIEF FOR INTERVENORS**

**COUNTER-STATEMENT OF THE CASE**

Petitioners' Statement of the Case does consider-  
able violence to the record.

As respects Mead's Market, the following facts are  
uncontroverted (JA 64-66, 160):



1. Mead's Market has never been a party to any collective bargaining agreement with a labor organization.

2. Mead's Market does not select demonstrators.

3. Mead's Market does not tell demonstrators what to say.

4. Mead's Market has never given any instructions or directions to demonstrators.

5. Mead's Market does not furnish the demonstrators' equipment.

6. Mead's Market does not determine the wages of demonstrators.

7. Mead's Market has never paid, directly or indirectly, the wages of demonstrators.

8. Mead's Market clerks never have put on demonstrations.

9. Mead's Market has never assigned a demonstrator or demonstrators the work of stocking shelves.

10. Demonstrators in Mead's Market have never worked at the cash register checking out customers and have never carried groceries to customers' cars.

11. If a demonstrator is demonstrating a particular product and the supply near the point of the demonstration is low, it is replenished by Mead's Market clerks.

Two suppliers of Mead's Market appeared as witnesses. They were James A. Barr, Branch Manager of Foremost Dairies, Monterey, California, and Rob-

ert L. Campbell, Branch Manager of Royal Crown Bottling Company, Salinas, California.

Barr testified that Foremost Dairies selected its demonstrators, paid them, determined their hours, told them the place or store to go to, and furnished their equipment. (JA 68-70.) Asked what qualifications he looked for in selecting a demonstrator, he replied, "Well, I look for someone that is going to do the kind of job that I want them to do". (JA 70.)

Campbell testified that Royal Crown Bottling Company selected its demonstrators, paid them, set their hours, and furnished their equipment. (JA 102-104.) As to selecting demonstrators, he said, "If I am impressed with her, I hire her. If I am not, I don't". (JA 102.) He stated unequivocally that demonstrators are "under our direction" and "working for us, not the store manager". (JA 105-106.)

Margaret Heintz, of Salinas, California, a demonstrator, testified that she demonstrated at Mead's Market. She was asked whether she received any directions at all from Mead's Market. She replied, "I believe the only thing that came up was about the location in the store, where I was to demonstrate". (JA 125.)

There is not a scintilla of evidence in the record that any demonstrator who has ever worked at Mead's Market has ever stocked displays, price marked merchandise, assisted in cleaning up the store, inventoried stock, made sales and made change as a checker would, or boxed or bagged groceries,

while working at Mead's Market. What demonstrators may (or more likely, may not) have done at the stores of other employers in Northern California is immaterial. Local 839 was not seeking a contract from Safeway Stores, Purity Stores, Mayfair Markets, or any number of others, when it picketed Mead's Market. It sought a contract from Mead's. There is no evidence that Mead's Market has ever been a member of the Food Industry Labor Service or any other employer bargaining group.

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#### **SUMMARY OF ARGUMENT**

The Board was correct in finding that demonstrators at Mead's Market are employees of the suppliers rather than Mead's. Petitioners' contention that demonstration work constitutes work which is fairly claimable by unit employees in their contract negotiations is incorrect, and in any event, it is not the thrust of petitioners' efforts that demonstration work be performed by unit employees.

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#### **ARGUMENT**

##### **A. THE DEMONSTRATORS ARE NOT EMPLOYEES OF MEAD'S MARKET.**

In its recent decision in *National Woodwork Manufacturers Association v. NLRB*, \_\_\_\_ U.S. \_\_\_\_, 87 S. Ct. 1250 (1967), the Supreme Court held that a contract clause prohibiting jobsite employees from handling prefabricated doors was lawful because it

was intended only to preserve for employees the work traditionally done by them. In determining whether similar clauses violated the statute, the Court concluded that "the touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* its own employees".

In the present case the Board found that demonstrators working at Mead's Market are employees of the suppliers rather than Mead's. The Board's finding is supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

The employer-employee relationship exists only where the employer has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the manner and means by which that result is accomplished. *NLRB v. Steinberg & Co.*, 182 F.2d 850 (C.A. 5, 1950). The record in this case is devoid of any suggestion that Mead's Market has or ever had such right.

---

**B. DEMONSTRATOR WORK IS NOT FAIRLY CLAIMABLE BY UNIT EMPLOYEES, AND IT IS NOT THE THRUST OF PETITIONERS' EFFORTS THAT IT BE PERFORMED BY UNIT EMPLOYEES.**

Petitioners rely on *Orange Belt District Council v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964), *Meat & Highway Drivers, Dockmen, etc. v. NLRB*, 335 F.2d 709 (D.C. Cir. 1963), *NLRB v. Local 28, Sheet Metal*

*Workers*, \_\_\_\_ F.2d \_\_\_\_, 56 LC No. 12061, 65 LRRM 2867 (C.A. 2 1967), and *S. & E. McCormick, Inc.*, 159 NLRB No. 1 (1966), and argue that demonstrator work is an integral part of clerk's work.

The Board's opinion correctly notes that clerks at Mead's Market have never performed demonstrations and that demonstrators at Mead's Market have never engaged in regular clerk's work while conducting a demonstration. (JA 165.)

The work of demonstrators is to introduce and give away free samples of products to customers. The work of clerks is to stock shelves, check out customers at the cash registers and carry merchandise to customers' cars.

Moreover, and fatal to petitioners' contention, is the obvious fact that it is not the thrust of petitioners' efforts that the members of the principal work unit, the clerks, perform demonstrations. Assuredly, even under petitioners' view, the same persons who have been performing demonstrations would continue to do so.

A brief examination of the cases cited by Petitioners is in order.

In *Orange Belt District Council*, the test was phrased as whether the subject clauses are "germane to the economic integrity to the principal work unit". Petitioners' efforts here do not meet that test.

In the *Meat & Highway Drivers* case, the problem was recovery of jobs lost by local drivers and retention of those still performed. In the *Local 28*

case the issue was the work of fabricating dampers which had traditionally been in the employers' shops by members of Local 28. In the *S. & E. McCormick* case the work performed by the unit employees and by the owner-operators of trucks who were involved was identical. The only evidence in the present case is that no Mead's Market clerk has ever done demonstration work, and that no demonstrator has ever done clerk's work there. There is no evidence of any interchange between demonstrators and clerks at Mead's Market.

The preponderance of the evidence is that the work of demonstrators at Mead's Market and the work of Clerks at Mead's Market is not functionally related.

After considering the demonstrator clauses sought by petitioners, the Board found that demonstrators would still be the suppliers' employees and subject to their actual control. (JA 166-167.) This finding has considerable support in the record. Referring to demonstrators, Claude H. Jinkerson, who is identified in petitioners' brief as president of the California State Council of Clerks, stated that "We have told them we would send them a slip, send a slip along with them to the supplier stating what they would have to get as to total compensation *from that supplier*". (JA 82; emphasis added.) George Kisling, president of Local 1288, stated that arrangements between the supplier and the retail store "is none of our business". (JA 122.)

As deduced by the Board, the clauses sought by petitioners require that *all* the terms of the stores'

contracts, including the union-security provisions, be applied to the demonstrators. This goes considerably beyond any legitimate consideration of protecting the economic standards of the members of the bargaining unit.

Petitioners argue that since a cessation of business is not shown, the Board's decision lacks any foundation. However, Section 8(e) forbids the agreement itself, "whether activated or in suspense". *NLRB v. Jt. Council of Teamsters*, 338 F.2d 23, 28 (C.A. 9 1964).

---

#### CONCLUSION

It is respectfully submitted that the Board's Order is entitled to enforcement.

Dated, Coalinga, California,  
October 26, 1967.

FRAME & COURTNEY,  
By TED R. FRAME,  
*Attorneys for Intervenors.*



## CERTIFICATE OF SERVICE

The undersigned certifies that one copy of Brief of Intervenor in the above-captioned matter has this day been served by air mail upon the following counsel at the addresses listed below:

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October 26, 1967

**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

---

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 21010

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCAL  
UNION No. 1288, AFL-CIO; RETAIL CLERKS INTER-  
NATIONAL ASSOCIATION, LOCAL UNION No. 839, AFL-  
CIO; AND RETAIL CLERKS INTERNATIONAL ASSOCIA-  
TION, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT  
AND  
JAMES R. MEAD AND ROGER MEAD, D/B/A MEAD'S  
MARKET, INTERVENORS

---

ON PETITION TO REVIEW AND ON CROSS-PETITION TO ENFORCE  
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

---

United States Court of Appeals

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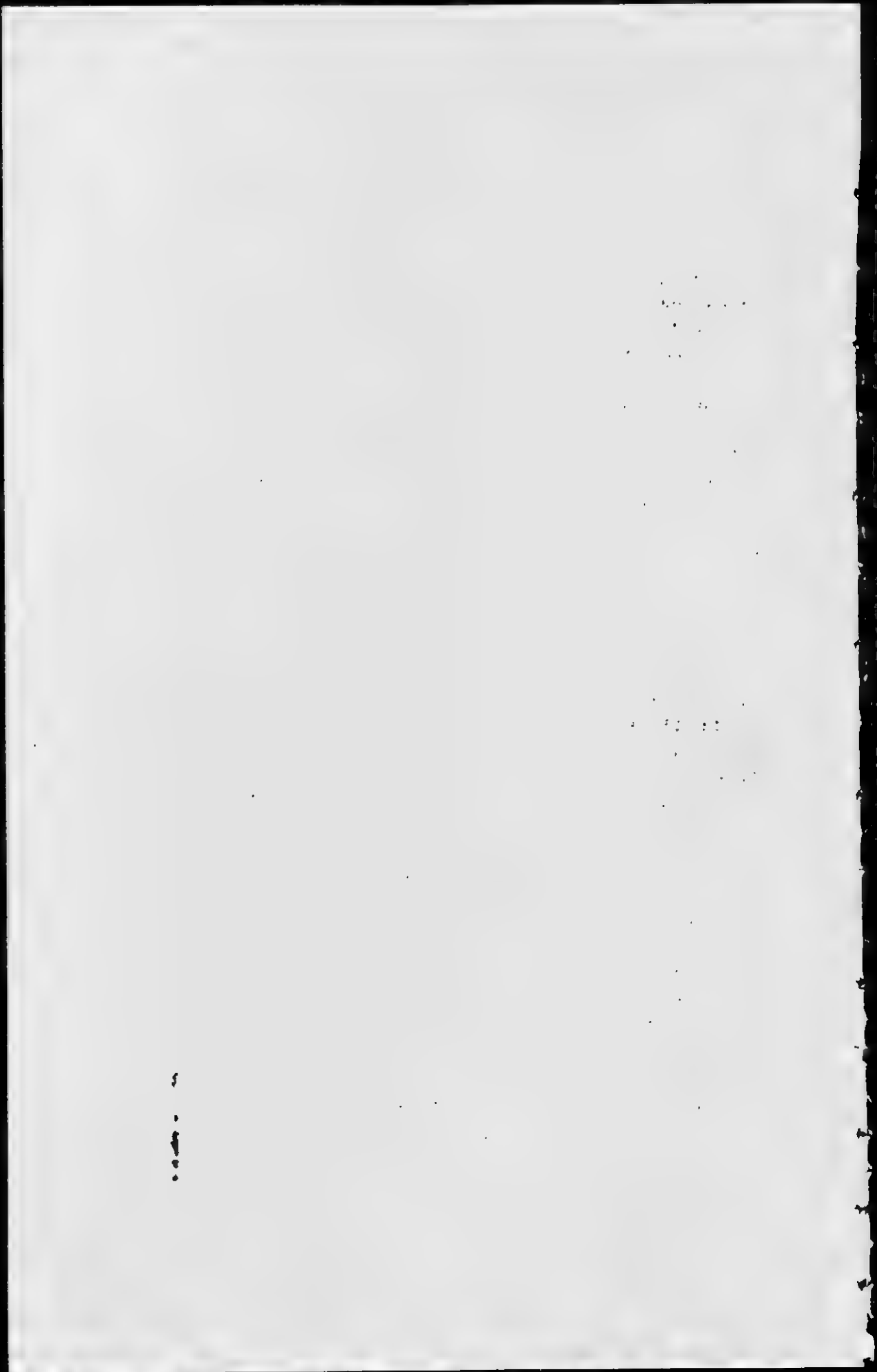
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**STATEMENT OF QUESTION PRESENTED**

Whether the Board erred in finding that the demonstrator contract provisions sought by the Unions are prohibited by Section 8(e) of the Act.

(1)



## INDEX

	Page
Statement of question presented.....	1
Counterstatement of the case.....	1
I. The Board's findings of fact.....	2
A. Background; the contract clauses.....	2
B. The demonstrators.....	4
II. The Board's conclusions and order.....	5
Summary of argument.....	6
Argument .....	7
The Board properly concluded that the demonstrator clauses are prohibited by Section 8(e) of the Act.....	7
Conclusion .....	20
Appendix .....	21

## AUTHORITIES CITED

### Cases:

<i>District No. 9, IAM v. N.L.R.B.</i> , 114 U.S. App. D.C. 287, 315 F. 2d 33.....	9, 18
<i>Drivers &amp; Chauffeurs Local 816, etc.</i> , 127 NLRB 1059, enfd, 292 F. 2d 329 (C.A. 2).....	12
<i>Koester, E. H., Bakery Co., Inc.</i> , 136 NLRB 1006.....	12
<i>Kold Kist, Inc.</i> , 149 NLRB 1449.....	12
<i>Lewis, Raymond O. v. N.L.R.B.</i> , U.S. App. D.C. , 350 F. 2d 801.....	8, 11
<i>Local No. 5, etc., Plumbers v. N.L.R.B.</i> , 116 U.S. App. D.C. 100, 321 F. 2d 366, cert. denied, 375 U.S. 921.....	9, 11
<i>Local No. 636, Plumbers v. N.L.R.B.</i> , 108 U.S. App. D.C. 24, 278 F. 2d 858.....	11
<i>Los Angeles Mailers Union No. 9 v. N.L.R.B.</i> , 114 U.S. App. D.C. 72, 311 F. 2d 121.....	9
<i>Meat &amp; Highway Drivers, etc., Local 710 v. N.L.R.B.</i> ( <i>Wilson &amp; Co.</i> ), 118 U.S. App. D.C. 287, 335 F. 2d 709 .....	8, 10, 14, 15, 18, 19, 20
<i>N.L.R.B. v. Atkins, E.C., &amp; Co.</i> , 331 U.S. 398.....	12
<i>N.L.R.B. v. Enterprise Ass'n</i> , 285 F. 2d 642 (C.A. 2).....	11

## Cases—Continued

<i>N.L.R.B. v. Joint Council of Teamsters</i> , No. 38, 338 F. 2d (C.A. 9)-----	Page 18
<i>N.L.R.B. v. Metropolitan Life Ins. Co.</i> , 380 U.S. 438-----	12
<i>N.L.R.B. v. Milk Wagon Drivers' Union, Local 753</i> , 335 F. 2d 326 (C.A. 7)-----	20
<i>National Woodwork Mfrs. Ass'n v. N.L.R.B.</i> , 386 U.S. 612-----	8, 11, 14, 19
<i>New Jersey Guards Union</i> , 124 NLRB 1097-----	12
<i>New York Mailers' Union No. 6 v. N.L.R.B.</i> , 114 U.S. App. D.C. 370, 316 F. 2d 371-----	9
<i>Ohio Valley Carpenters Dist. Council</i> , 144 NLRB 91, enfd, 339 F. 2d 142 (C.A. 6)-----	11
<i>Oil, Chemical &amp; Atomic Workers Int'l Union, Local 4-243 v. N.L.R.B.</i> , U.S. App. D.C. , 362 F. 2d 943-----	20
<i>Overton Markets</i> , 142 NLRB 615-----	13
<i>Plaza Provision Co.</i> , 134 NLRB 910-----	12
<i>Pyle, Duie A, Inc. v. N.L.R.B.</i> , F. 2d , 65 LRRM 3107 (C.A. 3)-----	10, 16, 17, 18
<i>S &amp; E McCormick, Inc.</i> , 159 NLRB No. 1-----	16
<i>Truck Drivers Union Local No. 413 v. N.L.R.B.</i> , 118 U.S. App. D.C. 149, 334 F. 2d 539, cert. denied, 379 U.S. 916-----	10, 19

## Statute:

<i>National Labor Relations Act, as amended</i> (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.)-----	
Section 8(b)(3)-----	2
Section 8(b)(4)(i)(ii)(A)-----	2
Section 8(b)(4)(B)-----	11
Section 8(e)-----	2, 7
Section 10(e)-----	2
Section 10(f)-----	2



# **United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21010

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCAL  
UNION No. 1288, AFL-CIO; RETAIL CLERKS INTER-  
NATIONAL ASSOCIATION, LOCAL UNION No. 839, AFL-  
CIO; AND RETAIL CLERKS INTERNATIONAL ASSOCIA-  
TION, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT  
AND

JAMES R. MEAD AND ROGER MEAD, D/B/A MEAD'S  
MARKET, INTERVENORS

ON PETITION TO REVIEW AND ON CROSS-PETITION TO ENFORCE  
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

## **COUNTERSTATEMENT OF THE CASE**

This case is before the Court upon the petition of the Unions<sup>1</sup> to review and set aside, and on cross-petition by the National Labor Relations Board to enforce, an order of the Board issued on April 3,

<sup>1</sup> Retail Clerks International Association, Local Unions Nos. 839 and 1288, AFL-CIO, Retail Clerks International Association, AFL-CIO.

1967. The Board's decision and order (J.A. 159-175)<sup>2</sup> are reported at 163 NLRB No. 112. This Court has jurisdiction under Section 10(e) and (f) of the Act.

#### **I. The Board's findings of fact**

The Board found that the Unions, by engaging in strikes and picketing with an object of forcing or requiring retail store operators to enter into agreements containing clauses prohibited by Section 8(e) of the Act, committed unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(A) of the Act. The Board further found that Local 1288, in conditioning the signing of an agreement by a retail store operator upon his acceptance of terms and conditions barred by Section 8(e) of the Act, engaged in unfair labor practices prohibited by Section 8(b)(3) of the Act.

#### **A. Background; the contract clauses**

Nickel's Pay-Less Stores of Tulare County, Incorporated ("Nickel's"), and James Mead and Roger Mead, co-partners d/b/a Mead's Market ("Mead's"), operate retail self-service grocery markets in northern California (J. A. 160). The employees at Nickel's and Mead's are represented in collective bargaining by Local 1288 and Local 839, respectively (J. A. 160). During the negotiations held in 1964,<sup>3</sup> the Unions

<sup>2</sup> "J.A." references are to portions of the record printed as a joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

<sup>3</sup> Nickel's had just withdrawn from the employer association to which it belonged, and had begun to bargain separately. Mead's was negotiating with Local 839 for the first time (J.A. 160).

sought to have Nickel's and Mead's agree to certain "demonstrator" clauses (J.A. 161; 61-62). The stores refused to accede to the demands of the Unions and Locals 1288 and 839 struck and picketed Nickel's and Mead's with an object of forcing compliance (J.A. 161; 15, 63). The disputed contract provisions read, in relevant part, as follows:

*Section 1—Recognition and Contract Coverage*

(a) *Recognition.* The Employer hereby recognizes the Union as the sole collective-bargaining agency for an appropriate unit consisting of all employees working in the Employer's retail food stores within the geographical jurisdiction of the Union \* \* \*.

(b) *Clerk's Work.* The work covered by this agreement shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof and such work shall consist of all work and services connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employer's retail food stores including the demonstration of such products \* \* \*. (J.A. 161; 128)

*Section 8—Classification of Employees*

(f) *Demonstrators.* All work connected with or incidental to the demonstration of merchandise offered for sale in the Employer's retail store (except merchandise referred to in Section 1(b) hereof as being excluded from this agreement) shall be covered by this agreement, and all such work shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof. No demonstrator may perform such work in the Employer's retail store

unless said demonstrator is on the payroll of the Employer, party hereto or a licensee of said Employer, and unless the Employer at all times holds and exercises full control of the terms and conditions of employment of any such demonstrators while such work is being performed in the Employer's retail store. *Demonstrators shall be covered by all the terms of this agreement.* All employees classified as demonstrators on April 1, 1964, shall be paid on the basis of the regular clerk's rate of pay. (J.A. 161-162) [Emphasis supplied.]

The agreements also provided for a union security clause.<sup>4</sup>

#### B. The demonstrators

For a number of years, many suppliers and producers have conducted demonstrations at Mead's and Nickel's stores. The demonstrations are held to stimulate sales of the products being given away and to increase, generally, the business of the stores. These demonstrations consist of the distribution of free samples by women, known as demonstrators, who also comment to shoppers about the virtues of the merchandise (J.A. 160; 15-18, 31, 39, 67, 72-73, 103).

The demonstrators who work at Nickel's and Mead's are hired by the suppliers. The suppliers also assign the demonstrators to the various grocery outlets, as well as set and pay their wages (J.A. 165; 17, 19-21, 33-36, 39-40, 43-44, 46, 48, 51-52, 57, 60, 63-66, 68-69, 87, 90, 94, 98-99, 102-103, 108, 111, 124-125). Additionally, the suppliers determine the demonstrators'

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<sup>4</sup> This provision, as well as part of the demonstrator clauses, was inadvertently left out of the Joint Appendix. They are printed in an Appendix to this Brief.

days and hours of employment and other working conditions, and instruct them as to what they should say about the product being demonstrated (J.A. 165; 19-20, 29, 35, 41, 47, 50-52, 55, 58, 65, 69-70, 72, 88, 90-91, 95, 99, 102-103, 124-125). The equipment used during a demonstration is furnished by the suppliers (J.A. 165; 18-19, 36-37, 42, 47, 49-50, 64-65, 70, 99, 104), who generally help the demonstrators set it up at the retail stores (J.A. 165, 90, 94-95, 104). The demonstrations that have taken place at Nickel's and Mead's, as in other grocery stores, are ordinarily held where the product is shelved or displayed (J.A. 137, 165; 24-25, 36, 40, 46, 55, 72, 104). Neither Nickel's or Mead's instruct the demonstrator when she arrives, or find it necessary to supervise her activities during the demonstration (which ordinarily runs two days) (J.A. 165; 29, 45, 52, 58, 65, 100, 106, 108, 125, 127). Rather, it is clear that the suppliers try to keep track of the demonstrators while the latter are working at Nickel's and Mead's (J.A. 165; 52, 101-102, 105, 125).

## II. The Board's conclusions and order

The Board found that the demonstrators working at Nickel's and Mead's are employees of the suppliers rather than of the stores, and not part of the stores' collective bargaining units. The Board further found that the disputed demonstrator clauses go beyond the legitimate purpose of protecting the wages and working conditions of unit employees, since the clauses require that demonstrator work be performed not only pursuant to union standards but also subject to union security provisions. Accordingly, the Board concluded

that the demonstrator clauses, like the typical union-signatory clause, violate Section 8(e) because they condition the store operators' freedom to do business with suppliers upon the latter's own internal labor relations policies.

The Board therefore concluded that petitioners' strikes and picketing with an object of forcing Nickel's and Mead's to adopt agreements containing the disputed clauses violated Section 8(b)(4)(i)(ii) (A) of the Act; petitioner Local 1288 was found to have violated Section 8(b)(3) of the Act by conditioning the execution of a bargaining agreement with Nickel's upon the latter's acceptance of the disputed provisions. The Board ordered the Unions to cease and desist from the unfair labor practices found, to notify Nickel's and Mead's that they will not insist upon inclusion of the disputed clauses in any bargaining agreement, and to post appropriate notices.

#### SUMMARY OF ARGUMENT

The demonstrator clauses at issue in this case would compel the signatory store operators to cease doing business with any suppliers who sent demonstrators to work at the stores unless the demonstrators worked under all the terms of the stores' bargaining contract, including the provision calling for compulsory union membership. Accordingly, the Board properly analogized the instant clauses to union-signatory subcontracting clauses which are indisputably secondary and unlawful under Section 8(e). While petitioners concededly are entitled to bargain and strike for the application of a compulsory union membership

provision to employees of the contract bargaining unit, the Board determined that the affected employees in this case—the demonstrators—are employees of the suppliers and outside the bargaining unit. Accordingly, application of the union security provisions to these employees is a matter as to which the store operators are neutrals.

The Board was not required, therefore, to determine whether the demonstrators' work was fairly claimable by the store employees' unit. For even assuming that the work was claimable, the law would still prohibit a contract clause—like those here involved—which allows the work to be performed by employees of other employers so long as those employees are union members.

In short, this is not a case in which a union has merely sought to preserve certain work to unit employees, or to require that such work be performed under conditions which do not undermine negotiated unit working conditions. Rather, this is a case in which unit employers have agreed to boycott other employers unless those other employers' employees become and remain union members.

#### **ARGUMENT**

**The Board properly concluded that the demonstrator clauses are prohibited by Section 8(e) of the Act**

Section 8(e) of the Act, enacted in 1959, was intended to supplement the existing prohibitions against secondary boycotts.<sup>5</sup> As the Supreme Court

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<sup>5</sup>The text of Section 8(e) appears in an Appendix to Petitioner's brief.



has recently explained, Section 8(e) does not prohibit all union-employer agreements which provide for or contemplate a cessation of business with other employers. Distinctions must be drawn, as in the traditional secondary boycott case, between union conduct aimed at the protection of employees in the contract unit, and conduct "tactically calculated to satisfy union objectives elsewhere". *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 644.

This Court has articulated the same distinction:

Thus, the "cease doing business" language in § 8(e) cannot be read literally because inherent in all subcontracting clauses, even those admittedly primary, is refusal to deal with at least some contractors. *Meat & Highway Drivers, etc., Local Union No. 710 v. N.L.R.B. (Wilson & Co.)*, 118 U.S. App. D. C. 287, 291, 335 F. 2d 709, 713-714 (hereinafter referred to as *Wilson*).

\* \* \* such a clause would not ordinarily violate § 8(e) so long as it was "germane to the economic integrity of the principal work unit" or sought "to protect and preserve the work and standards [the union] has bargained for". *Raymond O. Lewis, et al. v. N.L.R.B.*, — U.S. App. D.C. —, —, 350 F. 2d 801, 802.

In many Section 8(e) cases, resolution of the issue of primary versus secondary turns solely upon the manifest scope of the agreement itself and there is little or no dispute about the unit which may be properly served by a cease-doing-business agreement. Cases like *New York Mailers Union No. 6, International Typographical Union v. N.L.R.B.*, 114 U.S.

App. D.C. 196, 316 F. 2d 371; *District No. 9, IAM v. N.L.R.B.*, 114 U.S. App. D.C. 287, 315 F. 2d 33; and *Los Angeles Mailers Union No. 9 v. N.L.R.B.*, 114 U.S. App. D.C. 72, 311 F. 2d 121, are illustrative. The cease doing business agreements in those cases were found to embody secondary objectives because the agreement itself, in each case, specified that some other unallied employer would be boycotted if his employees were on strike or were working without a union contract or a union representative. Since it was obvious that the labor relations status of those other employees was a matter as to which the signatory employer was a neutral, such matters were deemed an unlawful basis, under Section 8(e), for conditioning further business dealings.

Sometimes, however, cases arise in which the signatory employer's agreement is conditioned upon matters as to which the signatory is less obviously a neutral. Thus, it may be perfectly clear which group of employees the signatory union seeks to affect; the problem is to determine whether the labor relations of these employees are a matter of primary concern vis-a-vis the signatory employer. For instance, a union's interest in having certain work performed only by union members is obviously a secondary object with respect to work subject to the control of some other unallied employer. For this reason, unions may not strike a contractor on the typical construction project because some other contractor on the site employs non-union labor. *Local 5, etc. Plumbers v. N.L.R.B.*, 116 U.S. App. D.C. 100, 321 F. 2d 366, cert. den., 375 U.S. 921. For the same reason, Sec-

tion 8(e) generally prohibits bargaining agreements which provide that any subcontracting of unit work must be confined to employees who are signatory to a union contract. *Truck Drivers Local 413 v. N.L.R.B.*, 118 U.S. App. D.C. 149, 158, 334 F. 2d 539, 548, cert. denied, 379 U.S. 916.

The instant case plainly falls within the latter category. By virtue of the disputed contract provisions, demonstrators' work must be performed subject to all the provisions of the bargaining contracts with Nickel's and Mead's, the retail store operators, including the provision requiring employees to join and retain membership in the union. Unless the demonstrators are store employees within the contract unit, therefore, the disputed clauses "restrict work to union members \* \* \* [and have the secondary] ancillary purpose of requiring the \* \* \* [employees] who wish to be able to do such work to join the union" *Wilson, supra*, 118 U.S. App. D.C. at 237, 335 F. 2d at 718. Accord: *A. Duie Pyle, Inc. v. N.L.R.B.* — F. 2d —, 65 LRRM 3107 (C.A. 3).

The central problem this case posed before the Board was essentially to determine the scope of the unit which petitioner unions might lawfully subject to a union-signatory clause. Contrary to petitioners' argument, the Board did not err in conditioning the resolution of the primary-secondary distinction upon such a determination. This Court has already acknowledged that contract clauses apparently lawful and primary on their face may actually constitute secondary, or union-signatory clauses, depending

upon the scope of the proper work unit. *Raymond O. Lewis, supra.*

Likewise, the Board's analysis is confirmed by the settled interpretation of Section 8(b)(4)(B), a companion provision to Section 8(e). See *Woodwork, supra*, 386 U.S. at 620, 633-635. Thus, findings of Section 8(b)(4)(B) violation have been uniformly approved in cases where a union brings strike pressure to bear on one employer although the underlying labor dispute is a matter over which some other employer has control. See, e.g., *Local 5, Plumbers, supra*; *N.L.R.B. v. Enterprise Assn.*, 285 F. 2d 642 (C.A. 2); *Local 636, Plumbers v. N.L.R.B.*, 108 U.S. App. D.C. 24, 278 F. 2d 858; *Ohio Valley Carpenters District Council*, 144 NLRB 91, enf'd 339 F. 2d 142 (C.A. 6). In these cases, as here, there is little or no dispute about which group of employees the union seeks to affect by its conduct. The question is whether those employees' labor relations status is a matter which may properly be the subject of strikes and bargaining within the union's contract unit, or whether such matters are properly for resolution only with another employer.

We now show, therefore, that the Board properly concluded that the demonstrators working at Nickel's and Mead's are employees of the suppliers rather than of the stores, and not part of the contract unit.

As shown in the Counterstatement, it is the suppliers—not the store owners—who hire the demonstrators, and who assign them to work at particular grocery outlets. It is the suppliers who set and pay the demonstrators' wages, determine their days and

hours of employment, and instruct them how to perform their work. Equipment used by the demonstrators is furnished by the suppliers, who ordinarily help the demonstrator to set it up at the retail store.

The store owners, on the other hand, perform virtually no functions with respect to the demonstrators' terms and conditions of employment. As the Board pointed out,

\* \* \* the work of a given demonstrator at a particular store is of brief duration; if she returns at all it will be at sporadic intervals \* \* \*. Whatever control over them is exercised by the stores is, we are satisfied, *de minimis* and merely an incident of the fact that they are performing their duties on the store premises \* \* \*. On these facts, in making an appropriate unit determination in a representation proceeding, we would not find demonstrators on the payroll of the suppliers to be includable in a unit of store employees. (J.A. 165).

In finding the demonstrators to be employees of the suppliers rather than the store owners, and outside the scope of the contract unit, the Board acted well within the scope of its discretion on such issues (See *N.L.R.B. v. E. C. Atkins & Co.*, 331 U.S. 398; *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438) and consistently with established precedent.\* Petitioners' argument to the contrary must fail. Indeed, most of the

\* *Drivers & Chauffeurs Local Union No. 816*, etc., 127 NLRB 1059, 1062-65, enf'd, 292 F. 2d 329, 331 (C.A. 2); *New Jersey Guards Union*, 124 NLRB 1097, 1099-1100; *Kold Kist, Inc.*, 149 NLRB 1449, 1450; *Plaza Provision Co.*, 134 NLRB 910, 911-912; *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006, 1007-1008.

authority mustered by petitioners (Br. 26-29) ostensibly in support of their claim that the demonstrators are employees of the store plainly do not deal with such a question at all. They deal with the question of whether certain individuals are "employees" at all, as opposed to "independent contractors."

*Overton Markets, Inc.*, 142 NLRB 615, cited by petitioners (Br. 29), is more to the point but the Board's unit decision in that case is clearly distinguishable. There the Board found 7 companies operating 10 stores to constitute a single employer for unit purposes because the same family owned or controlled all the stores, all of the companies had interlocking officers and were substantially interdependent financially, and the stores were operated as a single integrated enterprise.

If, as we have shown, the Board properly concluded that the demonstrators were employed outside the store unit by another employer, the disputed contract provisions are plainly secondary and unlawful. As the Board explained,

The effect of the demonstrator clauses, then, would be to subject the suppliers to all the terms of contracts to which they were not parties. Only suppliers who observed contract conditions, including the union security provisions, would be permitted to send demonstrators to Nickel's and Mead's. The clauses do not seek to retain or secure work for unit employees, for no less than before, they permit the practice of having demonstrators' work performed by suppliers' employees, who, as found

above, are not in fact part of the bargaining unit. (J.A. 167)

In short, to paraphrase the Supreme Court's opinion in *Woodwork, supra*, the contract here is not "addressed to the labor relations of the contracting employer vis-a-vis his own employees" but instead is "tactically calculated to satisfy union objectives elsewhere" 386 U.S. at 644-645.

Petitioners argue that the foregoing analysis is not dispositive. The Board should have gone further, they contend, and considered whether demonstration work is "fairly claimable" by the unit employees (Br. 30). The Board properly concluded that it was unnecessary to reach that question, however. Even assuming that demonstration work is, as petitioners contend, so integrated with retail store clerks' work as to constitute a legitimate subject of bargaining by the clerks' representative, the instant contract is still secondary and unlawful.

Thus, if the work were fairly claimable by unit employees, a unit bargaining contract could legitimately provide that such work should not be performed outside the unit except under wages identical to those in the unit. Such a provision would serve the usual primary function of removing from the unit employer the temptation of cheap labor and the consequent erosion of negotiated work standards within the unit. *Wilson, supra*, and cases cited therein at n. 16. Likewise, if the work were fairly claimable, a unit representative would be acting in support of a lawful primary objective to negotiate a provision which restricted the performance of such work to



unit employees (J.A. 163). But the instant contract seeks a different objective: demonstrators are allowed to remain employees of the suppliers, but they may not work in the stores unless they are subjected to the full Union agreement including union security. This Court has already explained that such interference with the labor relations of other employers and employees may not be justified because they perform work which is fairly claimable by the contracting unit's employees:

If the jobs are fairly claimable by the unit, they may \* \* \* be protected by provision for \* \* \* no-subcontracting or union standards clauses in the bargaining agreement.<sup>11</sup>

<sup>11</sup> The union recognition subcontracting clauses in the bargaining agreement, however, are illegal. [footnote by court]

*Wilson, supra*, 118 U.S. App. D.C. at 291, 335 F. 2d at 713, citations omitted.

Petitioners contend, contrary to the Board's finding, that the instant contract merely serves to limit demonstrators' work to employees of the stores (Br. 19-21). But the record does not support this contention. Prior to the instant dispute, as already shown, the suppliers hired and paid the demonstrators, and fully directed the manner of their work as well as the results to be achieved. The disputed contract provisions here change none of that. They still contemplate a situation in which the suppliers hire, pay and direct the work of the demonstrators. Indeed, petitioners' own witness at the Board hearing confirmed that the disputed clauses were sought only to clarify and make more specific the existing practices (J.A. 166). The

contractual requirement that the store owner must have "full control of the terms and conditions of employment" of the demonstrators while they are in his store would not therefore effect any real change in the operating facts establishing that the suppliers are the real employers here. Demonstrations would still be conducted by people hired, paid, controlled and directed by the suppliers. The only real difference would be that the demonstrators would be covered by the clerks' bargaining contract.

*S. & E. McCormick, Inc.*, 159 NLRB No. 1, rev'd *sub nom. A. Duie Pyle v. N.L.R.B.*, — F. 2d —, 65 LRRM 3107 (C.A. 3) is informative on this point. Petitioners rely on the Board's decision in that case to show that this contract merely serves the legitimate purpose of confining unit work to unit personnel. But, in *McCormick*, the Board's result emerged from a factually different context. In that case, the contracting unit consisted of truck drivers employed by a common carrier, and the union sought to apply all the bargaining contract provisions to drivers of leased equipment as well. The Board held this objective primary, noting that the drivers of the leased equipment were performing identical work to the employees admittedly within the unit, and that the contracting employer would assume all employer functions—including control over their work—by virtue of the union's contract proposal. In short, the Board viewed that case as one in which the union effort to

apply the full unit contract, including union security, to certain drivers was appropriate because those drivers were required to become unit members in any event.

The Third Circuit Court of Appeals, however, held that "the requirement that they must become employees and members of the union constitutes a reaching out for a 'secondary' objective, which is proscribed by Section 8(e)." 65 LRRM 3110. In the court's view, there was nothing to show that the bargaining unit's interests would not be fully protected by provisions requiring maintenance of union standards without affecting the labor practices of the drivers of leased equipment. Accordingly, the Board and the court disagreed with respect to the secondary nature of a contract provision which requires employees to become both employees of the unit *and* members of the union. That disagreement of course, affords no comfort to petitioners here. This is a case in which the affected employees, as shown above, are not even incorporated into the unit. Accordingly, the rationale for finding the disputed clauses secondary in *A. Duie Pyle* applies here even more pointedly:

[These provisions] \* \* \* do not require a carrier to put an end to subcontracting but only to terminate it as to subcontractees who refuse to become members of the union. Thus, their effect is to make the continuance of the relationship between the employer and an independent contractor depend upon the latter's decision to become a member of the union if

he is an owner-operator and to require his employees as well as himself to become members of the union if he is a fleet owner. The requirement therefore makes the central test of the employer's continuing to do business with such an individual his internal labor policy and not his maintenance of union wage scales or similar conditions which otherwise might adversely affect the unit members. This is substantially similar to provisions which permit an employer to subcontract only with third parties who are unionized. Such provisions have repeatedly been struck down under § 8(e) as implementing illegal secondary objectives. See, e.g., *N.L.R.B. v. Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28, 30-31 (9 Cir. 1964); *Meat & Highway Drivers, Dockmen, Helpers & Misc. Truck Terminal Employees, Local Union No. 710 v. N.L.R.B.*, 335 F. 2d 709, 717 (D.C. Cir. 1964); *District No. 9, International Association of Machinists v. N.L.R.B.*, 315 F. 2d 33, 36-37 (D.C. Cir. 1962). [*A. Duie Pyle, supra*, 65 LRRM at 3110]

Petitioners also challenged the Board's determination on the grounds that there is insufficient evidence of an unlawful motive by the Unions (Br. 19-22). Specifically, for example, petitioners assert that there would be no reason for their concern about the status of the demonstrators because they are always members of the Union anyway (Br. 20). But the record does not support that blanket generalization (J.A. 140-141) and it is immaterial in any event. If, as the Board found, the disputed clauses condition further business relations between employers upon

the demonstrators' union membership, the clauses are secondary and unlawful even though the Unions are merely *guaranteeing* the performance of secondary conditions which they traditionally have enjoyed as a matter of voluntary practice. Congress was aware that neutral employers often cooperate voluntarily with unions when it prohibited hot cargo agreements whereby such cooperation would be guaranteed.<sup>8</sup> And as the Supreme Court recently confirmed, "there need not be an actual dispute with the boycotted employer \* \* \* for the activity to [be deemed secondary] \* \* \* so long as the tactical object of the agreement and its maintenance is that employer \* \* \* (*Woodwork, supra*, 386 U.S. at 645). Lack of an active conflict between petitioners and some other union or employer is therefore irrelevant.

Moreover, petitioners' general insistence upon proof of secondary motivation has already been considered and rejected. As the Court explained in *Truck Drivers Local 413, supra*, rejecting a similar union argument, "extrinsic evidence of object alone [is] \* \* \* not determinative \* \* \* the contract must be tested by its terms, express or implied." 118 U.S. App. D.C. at 152, 334 F. 2d at 542.

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<sup>8</sup> See the legislative history summarized by the Supreme Court in *Woodwork, supra*.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for review should be denied and that a decree should issue enforcing the Board's order in full.\*

ARNOLD ORDMAN,  
*General Counsel,*  
DOMINICK L. MANOLI,  
*Associate General Counsel,*  
MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*  
GARY GREEN,  
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*National Labor Relations Board.*

OCTOBER, 1967.

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\* The fact that the Board disagreed with the Trial Examiner in this case does not substantially detract from the propriety of the Board's determination. The disagreement in this case was over the legal inferences to be drawn from established facts, not over the credibility of witnesses or other evidentiary issues. Hence, the Trial Examiner's superior opportunities for observing witness demeanor are immaterial here. *N.L.R.B. v. Milk Wagon Drivers' Union, Local 753*, 335 F. 2d 326, 328 C.A. 7. Rather, this is a case where "the presumptively broader gauge and experience of members of the Board have a meaningful role". *Oil, Chemical & Atomic Workers, Int'l Union, Local 4-243 v. N.L.R.B.*, — U.S. App. D.C. —, 362 F. 2d 943, 946.

## APPENDIX

### GENERAL COUNSEL'S EXHIBIT NO. 17

#### MASTER FOOD AND LIQUOR AGREEMENT RETAIL CLERKS LOCAL UNION NO. 1288 AFL-CIO

This Agreement, made and entered into this \_\_\_\_\_ by and between the RETAIL CLERKS UNION LOCAL NO. 1288, chartered by Retail Clerks International Association, AFL-CIO, hereinafter referred to as the Union, party of the first part, and \_\_\_\_\_ hereinafter referred to as party of the second part.

#### WITNESSETH

In consideration of the premises, and of the respective promises, agreements and covenants of the said parties hereto, they do hereby mutually agree as follows, to wit:

\* \* \* \* \*

#### Section 2—Employment of Union Members

(a) All employees covered by this Agreement shall within thirty-one (31) days after their employment, or within thirty-one (31) days after the signing of this agreement, whichever is later, become members of the Union and retain such membership as a condition of employment, subject to the provisions of Section 8(a)(3) of the Labor Management Relations Act.

\* \* \* \* \*



## Section 8—Classification of Employees

\* \* \* \*

(g) *Demonstrators.* All work connected with or incidental to the demonstration of merchandise offered for sale in the Employer's retail store (except merchandise referred to in Section 1(b) hereof as being excluded from this Agreement) shall be covered by this Agreement, and all such work shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof. No Demonstrator may perform such work in the Employer's retail store unless said Demonstrator is on the payroll of the Employer, party hereto or a licensee of said Employer, and unless the Employer at all time holds and exercises full control of the terms and conditions of employment of any such Demonstrators while such work is being performed in the Employer's retail store. Demonstrators shall be covered by all the terms of this Agreement. All employees classified as Demonstrators on May 1, 1964 shall be paid on the basis of the Regular Clerk's rate of pay.

\* \* \* \*

## GENERAL COUNSEL'S EXHIBIT NO. 18

## MASTER FOOD AGREEMENT

## BETWEEN

RETAIL CLERKS UNION LOCAL NO. 839, 984 LUPIN  
DRIVE, SALINAS, CALIFORNIA

## AND

FOOD EMPLOYERS OF THE COUNTIES OF MONTEREY,  
SANTA CRUZ AND SAN BENITO

(Effective July 1, 1964 to June 30, 1967)

\* \* \* \*

## Section 1

### RECOGNITION AND CONTRACT COVERAGE

(a) *Recognition.* The Employer hereby recognizes the Union as the sole collective bargaining agency for an appropriate unit consisting of all employees working the Employer's retail food stores within the geographical jurisdiction of the Union except meat department employees and supervisors within the meaning of the National Labor Relations Act, as amended.

(b) **CLERK'S WORK:** The work covered by this Agreement shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof and such work shall consist of all work and services connected with or incidental to the handling or selling of all merchandise offered for sale to the public in the Employers' retail food stores including the demonstration of such products, \* \* \*.

\* \* \* \*

## Section 3

### EMPLOYMENT OF UNION MEMBERS

(a) All employees covered by this Agreement shall within thirty-one (31) days after their employment, or within thirty-one (31) days after the signing of this Agreement, whichever is later, become members of the Union and retain such membership as a condition of employment subject to the provisions of Section 8(a)(3) of the Labor Management Relations Act. For the purpose of this Section, the execution date of this Agreement shall be considered as its effective date.

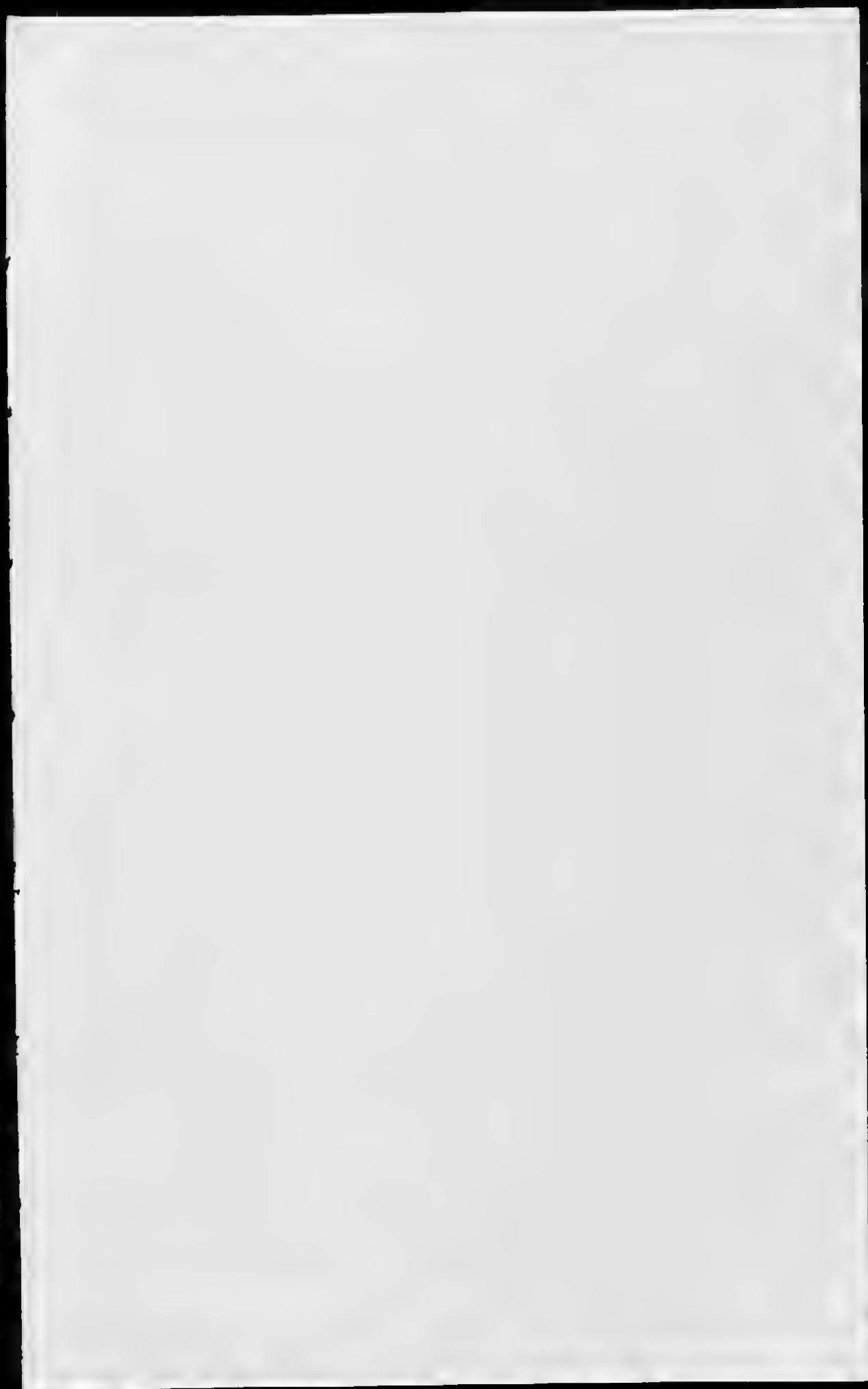
\* \* \* \*

## Section 14

## DEMONSTRATORS

All work connected with or incidental to the demonstration of merchandise offered for sale in the Employer's retail store (except merchandise referred to in Section 1(b) hereof as being excluded from this Agreement) shall be covered by this Agreement, and all such work shall be performed only by members of the appropriate unit as defined in Section 1(a) hereof. No Demonstrator may perform such work in the Employer's retail store unless said Demonstrator is on the payroll of the Employer, party hereto or a licensee of said Employer; and unless the Employer at all times holds and exercises full control of the terms and conditions of employment of any such Demonstrators while such work is being performed in the Employer's retail store. Demonstrators shall be covered by all the terms of this Agreement. All employees classified as Demonstrators on July 1, 1964 shall be paid on the basis of the regular Clerk's rate of pay.

\* \* \* \* \*



PETITIONERS' REPLY BRIEF

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,010

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RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 1288, AFL-CIO; RE-  
TAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 839, AFL-CIO; and  
RETAIL CLERKS INTERNATIONAL ASSOCIA-  
TION, AFL-CIO,

*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

JAMES R. MEAD and ROGER MEAD,  
d/b/a Mead's Market,

*Intervenors.*

On Petition to Review Order of  
National Labor Relations Board

JUL 13 1967

CARROLL, DAVIS, BURDICK & McDONOUGH,

ROLAND C. DAVIS,

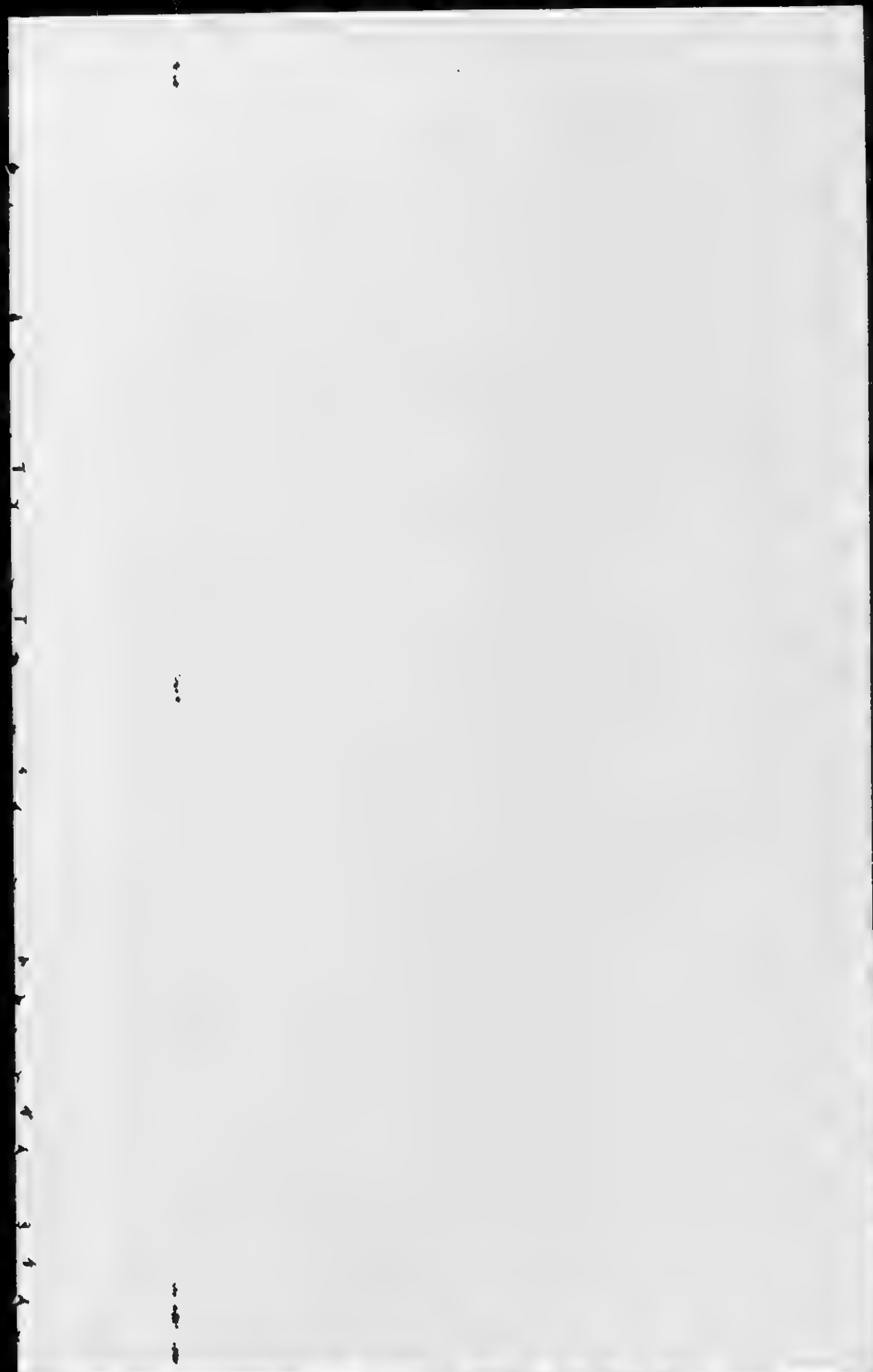
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## Subject Index

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	Page
A finding of violation of Section 8(e) of the act cannot be made by isolating particular employers and refusing to consider the operation of the disputed clauses in the context of the economic history and circumstances of the grocery industry in northern California .....	2

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## Table of Authorities Cited

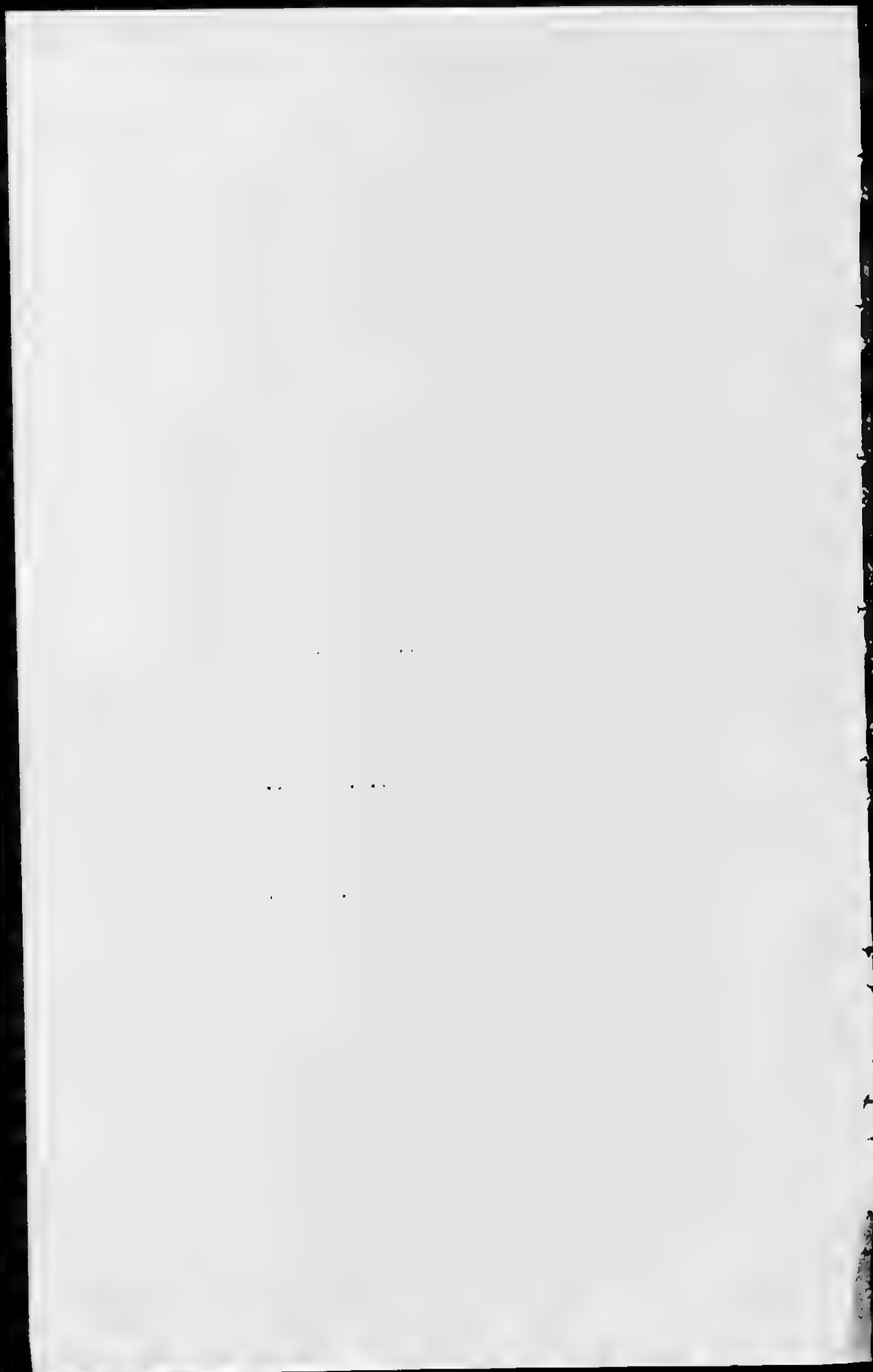
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Cases	Pages
A. Duie Pyle v. NLRB, ____ F.2d ____, 65 LRRM 3107 (C.A. 3, 1967) .....	5
Meat & Highway Drivers, etc. Local Union No. 710 v. NLRB (Wilson & Co), 118 U.S.App. D.C. 287, 335 F.2d 709 ..	3, 5
National Woodwork Mfgs. Association v. NLRB, 386 U.S. 612, 87 S.Ct. 1250 .....	4
Orange Belt District Council v. NLRB, 328 F.2d 534, 537-538 (D.C. Cir. 1964).....	3
NLRB v. Rockaway News Co., 345 U.S. 71, 79 .....	6
S. & E. McCormick, Inc., 159 NLRB No. 1, rev'd on other grounds .....	5

## Statutes

National Labor Relations Act (as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 160f), Section 8e .....	2, 3
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No. 21,010

IN THE

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION No. 1288, AFL-CIO; RE-  
TAIL CLERKS INTERNATIONAL ASSOCIATION,  
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JAMES R. MEAD and ROGER MEAD,

d/b/a Mead's Market,

*Intervenors.*

On Petition to Review Order of  
National Labor Relations Board

PETITIONERS' REPLY BRIEF

**A FINDING OF VIOLATION OF SECTION 8(e) OF THE ACT CANNOT BE MADE BY ISOLATING PARTICULAR EMPLOYERS AND REFUSING TO CONSIDER THE OPERATION OF THE DISPUTED CLAUSES IN THE CONTEXT OF THE ECONOMIC HISTORY AND CIRCUMSTANCES OF THE GROCERY INDUSTRY IN NORTHERN CALIFORNIA.**

Respondent and Intervenors in their briefs to this Court have persisted in an attempt to isolate the disputed clauses herein from the context in which the same arose, namely, the retail grocery industry of Northern California. The Trial Examiner found, as an uncontroverted fact, that this industry in Northern California is a highly organized one covered by collective bargaining agreements with various locals of the Retail Clerks International Association and an industry in which much of the bargaining had taken place on a multi-employer basis (J.A. p. 134). Indeed, one of the charging parties herein, Nickel's, had been part of that very multi-employer bargaining.

However, Respondent and Intervenors urge that this Court entirely disregard these circumstances in assessing the validity of the industry-wide demonstrator clauses. Such a position is factually unrealistic and legally unfounded.

Perhaps the most complete reply to Respondent and Intervenors is that made by the Trial Examiner, himself, in his decision in the instant matter:

*"The General Counsel's contention has a persuasive ring if it be considered in isolation from past practice and bargaining history. The issue, however, does not arise in a vacuum. On the contrary, it comes up against a background of dem-*

onstrator practices in an industry of which Nickel's and Mead's are an integral part. While it is true that neither Nickel's nor Mead's has a history of using its own clerks in demonstrations, *it is not claimed that clerks and demonstrators function differently in these two stores from the manner in which they do in the rest of the industry.*" (J.A. pp. 151-152; emphasis added)

However, by adhering to the development of their "isolation" theory, the Board in its discussion of this case (J.A. p. 165) and the General Counsel in his brief demonstrate that they have both failed to listen and comply with the instructions of this Court. Petitioners submit that this Court has correctly defined the scope of the problem area to be considered by requiring an assessment of the economic history and circumstances of the industry in which the agreement arose in order to ascertain whether the proposed clause is "germane to the economic integrity of the principal work unit," *Orange Belt District Council v. NLRB*, 328 F.2d 534, 537-538 (D.C. Cir. 1964). By adopting such a requirement, Petitioners believe that this Court has made it clear to the Board and the General Council that cases involving an alleged violation of Section 8(e) cannot be determined in a vacuum apart from the historical and factual circumstances of the industry as a whole. As the Court stated in *Meat & Highway Drivers, etc., Local Union No. 710 v. NLRB (Wilson & Co.)*, 118 US App. D.C. 287, 335 F.2d 709 at 716:

"To conclude that a contractual term falling within the letter of Section 8(e) properly falls

within its prohibition, there must be either a finding that both parties understood and acquiesced in a secondary object for the term, or a finding that secondary consequences within Section 8(e)'s intendment would probably flow from the clause, *in view of the economic history and circumstances of the industry, the localities and the parties.*" (Emphasis added)

Petitioners contend that the above considerations are especially relevant, if compliance with the rationale expressed in the Supreme Court's decision in *National Woodwork Mfgs. Association v. NLRB*, 386 U.S. 612, 87 S.Ct. 1250, is to be obtained. Thus, in determining whether in the instant case, the contracting out of demonstration work is a mandatory subject of bargaining, is the Union to be precluded from utilizing its experiences with thousands of other grocery operators in Northern California (whom the Trial Examiner found do not function any differently from Mead's and Nickel's, J.A. pp. 151-152) in trying to protect, preserve or, in some instances, recapture work for unit employees?

The Board decided that because Nickel's and Mead's had never exercised a requisite degree of control over the employment of demonstrators, that with particular regard to these employers, the persons performing demonstrator work could not be considered as part of the appropriate bargaining unit (J.A. pp. 164-165). Should this finding end the inquiry as the Board and General Counsel (Resp. Brief pp. 9-10) assume? Petitioners submit it does not. A union can protect itself

against potential inroads made against the work of the unit employees irrespective of whether the situation is actually confronting it in negotiations with the particular employer involved at that time. As we pointed out in the Opening Brief (pp. 25-26), the Board has already confirmed this view in *S. & E. McCormick, Inc.*, 159 NLRB No. 1, rev'd on other grounds sub. nom. *A. Duie Pyle v. NLRB*, — F.2d —, 65 LRRM 3107 (C.A. 3, 1967).

Given the premise that such protective clauses are mandatory subjects of bargaining, the question thus becomes whether a particular employer who arguably has not been utilizing his own employees to perform demonstration work in his store can be lawfully required to bargain over a clause which would require that the work be done by persons in his employ and under his control? At most this is all the disputed clause states and in this regard the clause and the factual circumstances are no different from that considered and approved by this Court in the *Meat & Highway Drivers* case, *supra*, where the clause in that case provided that truck shipments by each meat packer to its customers within Chicago be made from a Chicago distribution facility of the Employer by employees covered by this agreement (*Id.* at p. 711).

Even if the Board had disagreed with the legality of the additional parenthetical "or licensee" language of the clause, which was inserted by the food employers for their own administrative convenience, it should have extended its inquiry to ascertain whether the remainder of the clause confining demonstration

work to unit employees was fairly claimable. This the Board specifically refused to accomplish (J.A. p. 164) and instead struck down the entire clause (J.A. pp. 170-171).

By taking this action, the Board has erred in invalidating more of the contract than even it contends is unlawful (see *NLRB v. Rockaway News Co.*, 345 US 71, 79).

For the above stated reasons, Petitioners submit that their petition should be granted and the complaint against them dismissed.

Dated, December 7, 1967.

CARROLL, DAVIS, BURDICK & McDONOUGH,  
ROLAND C. DAVIS,  
ROBERT P. COWELL,  
S. G. LIPPMAN,  
*Attorneys for Petitioners.*



PETITION BY THE NATIONAL LABOR RELATIONS BOARD  
FOR MODIFICATION OF OPINION

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,010

RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 1288, AFL-CIO;  
RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 839, AFL-CIO; and  
RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
AFL-CIO,

*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

and

JAMES R. MEAD and ROGER MEAD,  
d/b/a MEAD'S MARKET,

*Intervenors.*

ARNOLD ORDMAN,  
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*Associate General Counsel,*

United States Court of Appeals  
for the District of Columbia Circuit  
MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*

FILED FEB 2 1968

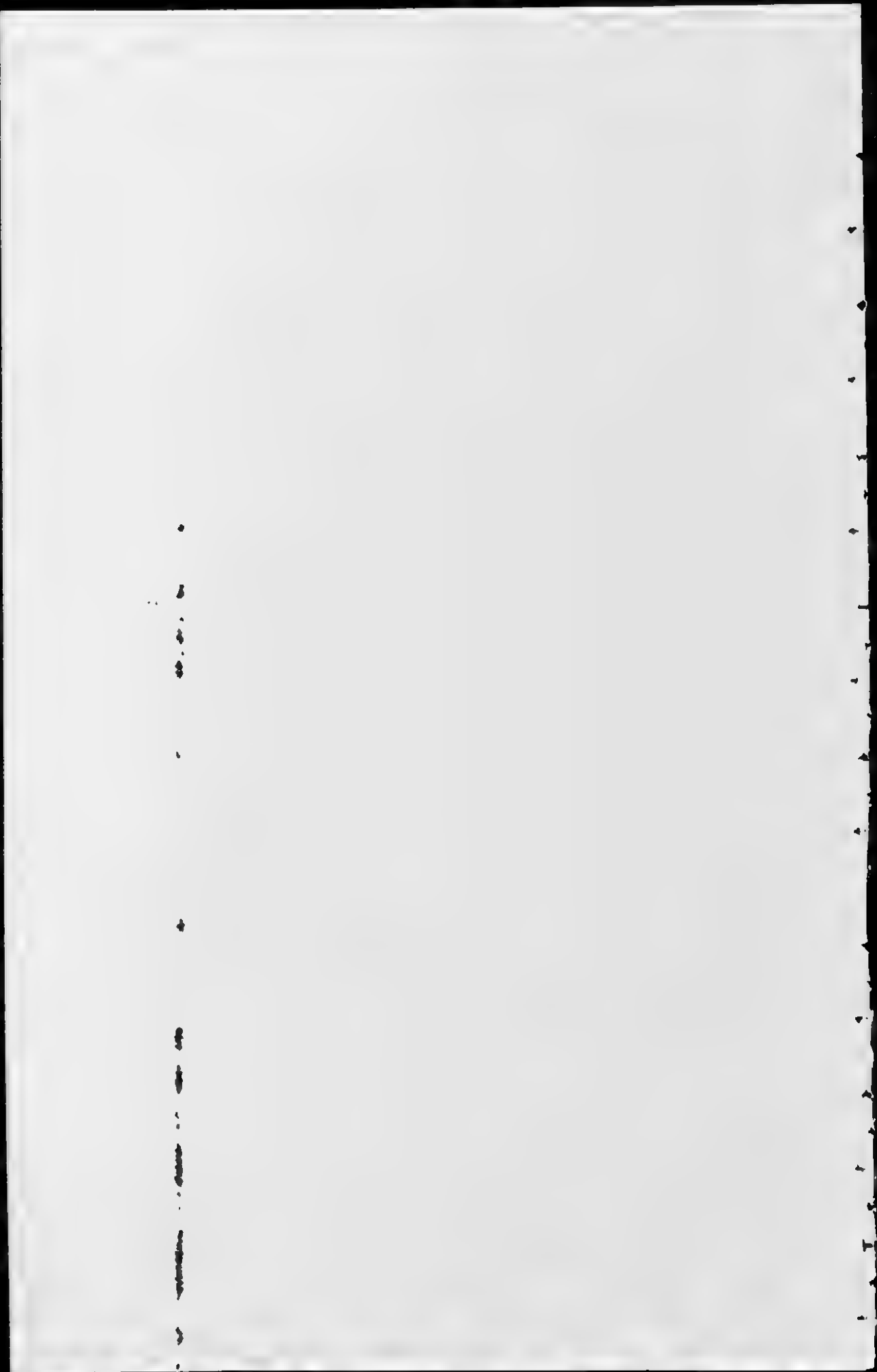
GARY GREEN

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*Attorneys,*

*Nathan J. Paulson*  
CLERK

National Labor Relations Board



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,010

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RETAIL CLERKS INTERNATIONAL ASSOCIATION,  
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*Intervenors.*

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## PETITION BY THE NATIONAL LABOR RELATIONS BOARD FOR MODIFICATION OF OPINION

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The National Labor Relations Board hereby petitions for modification of that portion of the Court's decision, dated January 18, 1968, which amended the terms of the Board's remedial order. In support of its petition, the Board respectfully shows the Court as follows:

The Court's decision in this case approved the Board's findings of unfair labor practices. Specifically, this Court agreed that the Unions<sup>1</sup> had insisted upon employer agreement to a food demonstrator clause which ran afoul of Section 8(e) of the Act, and that the Unions' striking and picketing to obtain the clause constituted unfair labor practices in violation of Sections 8(b)(4)(i)(ii)(A) and 8(b)(3). The rationale of this holding was that the clause at issue subjected demonstrators to the full coverage of the bargaining contract applicable to certain retail stores, including the requirement of union membership, even though the demonstrators were not in fact the employees of the stores. However, this Court then proceeded to consider, *sua sponte*, and to modify, the scope of the Board's remedial order. In so doing, we respectfully submit, the Court erred.

The Court stated that "the demonstrator clause would be unobjectionable if the language permitting the demonstrators to be on the payroll of another employer is excised . . ." (sl. op., p. 8). Accordingly, the Court altered the Board's remedial order from a prohibition against insisting upon execution of the particular clause involved in this case to a prohibition against insisting upon the clause unless the language permitting demonstrators to remain on another employer's payroll were excised. But this analysis overlooks the rationale upon which the Board found the clause unlawful.

Prior to the Unions' decision to compel adoption of the disputed clause in this case, it is clear that the suppliers, not the store owners, performed all the employer functions vis-a-

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<sup>1</sup> Retail Clerks International Association, Local Unions Nos. 839 and 1288, AFL-CIO, Retail Clerks International Association, AFL-CIO.

vis the demonstrators. As we showed in our brief, pp. 4-5, it was the suppliers who hired the demonstrators, assigned them to a particular store, set and paid their wages, determined their days and hours of employment and other working conditions, and instructed them in how to perform their work.

Nor would the disputed contract clause have significantly altered this relationship. One of the Unions' own witnesses admitted that the clause was sought only to clarify and make more specific the existing practices (J.A. 166). Accordingly, the clause, irrespective of its wording, was still intended to sanction a situation in which the suppliers hire, pay and direct the work of the demonstrators. As the Board noted (J.A. 166), "There is no indication in the instant case that the relationship between the stores and the demonstrators would change pursuant to the full control provision [of the disputed clause.]"<sup>2</sup>

Thus, the vice in the demonstrator clause was *not*, as this Court seems to suggest, simply that it allowed demonstrators to remain on the payroll of the licensees (i.e., suppliers), but that it was sought to be applied to the demonstrators at all. For the demonstrators, irrespective of the payroll on which they may be carried, were still in fact the employees of the suppliers and not of the stores — in view of the substantial control which the suppliers would in fact retain with respect to the results to be achieved and the manner and means by which the work was to be performed (J.A. 166). Therefore, it was inappropriate for the Court to assume that the Unions' violation would be remedied, and the policies of Section 8(e) effectuated, merely by requiring deletion of that portion of the disputed clause relating to other employers' payrolls.

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<sup>2</sup> This point is discussed in the Board's brief, pp. 15-16.

This case differs from *Meat & Highway Drivers, etc. v. N.L.R.B.*, 118 U.S. App. D.C. 287, 295, 335 F. 2d 709, 717. There, unlike here, it could reasonably be assumed that, with the deletion of the invalid provision, the contract would only have lawful application.

For the reasons stated, we respectfully request that the Court (a) delete the concluding portion of its opinion in the instant, beginning with the sentence on sl. op., p. 7, "We do not enforce the Board's order as issued, however, because it sweeps too broadly," and (b) issue a judgment enforcing the Board's order in full.

Respectfully submitted,

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MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*

GARY GREEN,  
ALAN D. EISENBERG,  
*Attorneys,*

NATIONAL LABOR RELATIONS BOARD

February, 1968



**CERTIFICATE**

**This petition for modification is filed in good faith and  
not for purposes of delay.**

---

**Marcel Mallet-Prevost  
Assistant General Counsel  
NATIONAL LABOR RELATIONS BOARD**